

J.R.L. Food Corp. d/b/a Key Food and Local 1500, United Food and Commercial Workers Union, AFL-CIO. Cases 2-CA-31661, 2-CA-31698, 2-CA-31709, 2-CA-31810, 2-CA-31862, and 2-CA-31876

September 28, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On April 12, 1999, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and supporting briefs. The General Counsel also filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions

¹ The Charging Party and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

After the issuance of the judge's decision, the General Counsel petitioned the United States District Court for the Southern District of New York for preliminary injunctive relief under Sec. 10(j) of the Act. The district court affirmed all of the judge's findings except that it refused to order the reinstatement of Alba Cortes. Instead, the district court found the judge's "general assessment of Ruben Luna's credibility to be an insufficient basis to conclude that Alba Cortes would not have been discharged but for her union activities." *Silverman v. J.R.L. Food Corp.*, 162 LRRM 2169 (S.D.N.Y. 1999) (full text of oral opinion). The United States Court of Appeals for the Second Circuit subsequently reversed the district court's decision regarding employee Cortes and remanded for entry of the requested temporary injunction reinstating her to the Respondent's employment. 196 F.3d 334 (1999). The court found that the district court had failed to accord the judge's decision appropriate deference and that its finding of no reasonable cause to reinstate Cortes was not supported by the record. The court noted that "[t]here was ample evidence, consisting of Cortes testimony and that of the corroborating employees, to establish reasonable cause to believe that the alleged unfair labor practices had occurred." 196 F.3d at 337. As to the Respondent's defense that Luna had observed Cortes giving away merchandise, the court found that the judge's discrediting of Luna's testimony and his crediting of Cortes' testimony was supported with detailed references to other record testimony and documentary evidence as well as logical inferences to be drawn from the record. The court also found that the judge implicitly rejected another witness' testimony that he had witnessed Cortes giving away merchandise. Consequently, the court found no basis in the evidence for the district court's conclusion that the Board would necessarily reject the administrative law judge's credibility assessments or overturn the findings that depend on those assessments.

only to the extent consistent with this Decision and Order² and to adopt the recommended Order as modified and set forth in full below.³

1. The Respondent operates a retail grocery store at 3515 Jerome Avenue in the Bronx. The Respondent's sole shareholders are two brothers, Ruben and Jaime Luna. The Luna brothers also own three other supermarkets under different corporate entities. The Respondent acquired the Jerome Avenue store on January 12, 1998.⁴ The Union had represented the employees of the predecessor owner of the supermarket.⁵ For several weeks after the purchase, the Union attempted to obtain recognition, but was unsuccessful. In mid-February, the Union began an organizing campaign directed at the Respondent's employees.

The Respondent had employed Cupertino Luna (Cupertino) at the Jerome Avenue store as a "stockboy" since March. Cupertino signed an authorization card on July 27. On August 15, Assistant Floor Manager Jose Rivera unlawfully interrogated Cupertino and threatened him with discharge after he observed Cupertino exchanging pleasantries with union officials leafleting outside the store. On August 17, 2 days later, Cupertino was transferred to another of the Respondent's stores.

The judge found that the General Counsel met its initial burden under *Wright Line*⁶ of demonstrating that Cupertino's union activity was a motivating factor in the

² There were no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by interrogating employees on August 4 and 5, 1998; by interrogating employee Cupertino Luna and other employees and threatening them with discharge on August 15; by directing employees not to join the Union and to report other employees' union activities and threatening to reduce their hours in order to induce them to quit the Union during mid- to late August; by interrogating employees regarding their cooperation with the Board's investigation of an unfair labor practice charge in mid-September; and by interrogating employee Cortes and threatening to reduce her hours, and directing her to report other employees' union activities at various other times up to October 22. Nor were there any exceptions to the judges' findings that the Respondent violated Sec. 8(a)(3) by discharging employee Ruddy Rodriguez on August 5 and employee Juan Rodriguez on August 29.

The General Counsel and the Charging Party have excepted to the judge's failure to find that the Respondent violated Sec. 8(a)(1) by threatening employee Cupertino Luna in June or July. We find it unnecessary to pass on these exceptions as any additional findings of unlawful threats would be cumulative to the findings the judge made, which we adopt, and would not affect the remedy.

³ We will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

⁴ All dates hereafter are in 1998.

⁵ Although the Respondent retained at least some of the predecessor's employees, there is no allegation that the Respondent was a successor with an obligation to recognize and bargain with the Union.

⁶ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Respondent's decision to transfer him from the Jerome Avenue store to the Respondent's newly opened C-Town supermarket. The judge noted that the transfer occurred almost immediately after the unlawful interrogation and threat made by Rivera. Although the judge acknowledged that the Respondent did not fire Cupertino as Rivera had threatened, the judge noted that he was abruptly removed from the store without explanation. The judge further found, however, that the Respondent met its burden of establishing that it would have transferred Cupertino even in the absence of his union activity, since he concluded that the transfer followed the Respondent's customary practice of staffing its newly acquired stores with transferred employees. Specifically, the judge noted that the Respondent had transferred an entire meat department from another store to assist in the January opening of the Jerome Avenue store and that a summary provided by the Respondent and put in evidence at the hearing herein also indicated that other employees had been transferred to the new store.

The General Counsel and the Charging Party except, contending that the judge erred in finding that the Respondent had rebutted the General Counsel's initial case and that the Respondent has failed to demonstrate by a preponderance of the evidence that it transferred Cupertino for legitimate business reasons. We find merit in these exceptions.

The Board has long held that "[a]n employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *T&J Trucking Co.*, 316 NLRB 771 (1995); *Mainline Contracting Corp.*, 334 NLRB 922, 932 (2001). In the instant case, the Respondent did not maintain any written records or policy regarding transfers and provided only limited evidence as to its past practice of transferring employees to and from stores owned by the Luna brothers. Ruben Luna testified that he and his brother would consult with each other to determine which employees at their jointly owned stores were available for transfer. However, Ruben Luna failed to testify as to why Cupertino was selected for transfer over numerous other employees.⁷ Cupertino was the only "stockboy" transferred to the new store and there is no evidence that he possessed any special skills that would warrant his selection over numerous other stockboys. Although the Respondent submitted a summary of prior transfers, the summary was compiled from Luna's memory and was unsupported by official records. Further, the summary establishes only 11 transfers among its

four stores in 1998 and does not indicate either the timing or reason for the transfers. As the judge concluded, although the summary establishes that three other employees were transferred to the new store, it does not indicate when these transfers occurred. We find that the summary fails to establish that the Respondent had an established policy of transferring employees to staff new stores.

The judge also relied on employee Olga Caraballo's testimony that four meat department employees were transferred from the Respondent's Madison Avenue to the Jerome Avenue store. Contrary to the judge, we do not find that her testimony establishes that the Respondent maintained a consistent practice of staffing a new store with transfers. In contrast to Cupertino, a stockboy, the meat department employees were relatively skilled workers with specific duties that would be especially useful at the new store. Caraballo testified that she trained a new meat department employee while she was at the Jerome Avenue store.

Cupertino was never given a reason for the transfer, but was abruptly told by Luna that he was going to the new store on his next workday. This combined with the fact that Cupertino's unexplained transfer occurred just 2 days after the unlawful interrogation and threat establishes strong evidence that Cupertino's transfer was unlawfully motivated. Given that we cannot agree with the judge that the Respondent established that the transfer was in accordance with the Respondent's customary practices, we must find that the Respondent has failed to meet its burden of rebutting the General Counsel's initial case and we conclude that the transfer violated Section 8(a)(3) and (1).

The General Counsel and the Charging Party also except to the judge's recommendation to dismiss the complaint allegation that the Respondent unlawfully reduced Cupertino's pay. Cupertino testified that he requested shorter hours from Luna only at his initial prehire interview in the Jerome Avenue store and that Luna then reduced his schedule from 12 to 11 hours. Cupertino made no request for a further reduction. After Cupertino's transfer, Luna further reduced his shift another 3–4 hours. Given the close association of the reduction in hours with the discriminatory transfer, we find that the reduction in pay also violated Section 8(a)(3) and (1).

2. Jorge Santana had been an employee of the Respondent for 5 years and was in charge of the produce department at the Jerome and Madison Avenue stores when he was terminated on December 1. Santana was a key union organizer and was instrumental in obtaining employee signatures on union cards. The Respondent was aware of Santana's support for the Union. At about noon

⁷ Jaime Luna did not testify at the hearing.

on December 1, Santana was told that someone was looking for him at the front of the store and saw a deliveryman from one of the Respondent's suppliers. Since he was not expecting a delivery until the end of the week, Santana initially decided to send the deliveryman away. However, Santana decided that he could use some of the merchandise after all and stepped outside to talk to the deliveryman. General Manager Manuel Matista, an admitted supervisor, followed Santana outside and began a loud and abusive tirade, accusing Santana of loafing. Santana responded by saying his work was always complete and that Matista should respect him as an older man and not speak to him in that manner. During this heated dialogue, Santana "poked" or touched Matista with his finger.⁸ Following Santana inside the store, Matista told Santana that he was fired, and yelled to the store secretary to prepare Santana's check. Santana told Matista that Luna had hired him and that Matista was not his boss. He then left for lunch and returned to work in the produce department at 1 p.m.

Around 3 or 4 p.m., Luna approached Santana and asked him what had happened. Santana told him that he and Matista had a little argument and that Matista cursed him out. According to Santana, Luna told him not to worry. A few minutes later, Santana saw Luna and Matista talking at the front of the store.

Approximately 4 hours after the incident, Matista phoned the police to report an "assault in progress." At approximately 5 p.m. two police officers responded. The policemen asked Santana if he had hit Matista and Santana told them he had not. The policemen also asked Matista if Santana had hit him and, according to Santana, Matista responded, "No, I'd be lying if I said that he hit me. He just touched me. I don't want him in the store, that's all. I don't want him in the store anymore." The policemen called Luna from the front of the store and asked about sending Santana to a different store. Luna told them he would not commit to sending Santana to another store. The police then asked Luna if Santana was fired. Luna told Santana that he was sorry, but if Matista said Santana was fired, then Santana was fired. Santana replied that if Luna said he was fired, he would go, but that he would not accept that from Matista because Matista was not his boss. Santana was then given his final check and left the store.

⁸ The judge credited Santana's testimony that "I just touched him with my finger. I didn't push him, I just touched him—and I pointed my finger on his shoulder and I told him to respect me, that I was older than him, that he owed me respect and then I walked inside the store." The judge also noted that Santana's testimony was corroborated by employee Virgilio Pena and security guard Raphael Corniel.

The judge found that the General Counsel met his initial burden under *Wright Line*, supra, to demonstrate that Santana's protected union activity was a motivating factor in the Respondent's decision to discharge Santana. It was undisputed that Santana engaged in union activity and that the Respondent knew of his involvement. Anti-union animus was clear from the many unfair labor practices the judge found. The judge concluded, however, that the Respondent would have terminated Santana even absent his union activity because the verbal dispute involved a challenge to Matista's authority, resulting in Santana poking Matista, and that this conduct exceeded the bounds of permissible employee conduct. The General Counsel and the Charging Party except, and, for the reasons set forth below, we find that the Respondent seized on Santana's conduct as a pretext to disguise an unlawful discharge.

The Board and the courts have long recognized that an employer cannot provoke an employee to the point where he commits an indiscretion and then rely on that conduct to terminate his employment. *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965). Here, we agree with the judge that the Respondent, through Matista's profane and abusive tirade, provoked Santana's protest and his touching Matista on the shoulder with his finger for emphasis. While an employee is not justified in resorting to violent self-help to settle differences with a supervisor, we do not find that Santana's conduct amounted to that or was so unreasonable in relation to the Respondent's provocation as to justify his discharge. See *Opelika Welding*, 305 NLRB 561, 567 (1991) (employee's pushing away finger waved in face by manager during loud confrontation does not constitute insubordination justifying discharge); *E. I. du Pont & Co.*, 263 NLRB 159 (1982) (open-palmed push of supervisor insufficient to justify discharge).

Prior to the events of this case, the Respondent had fired only one employee and that was for absenteeism. Luna testified that he had no set system of discipline and that he kept no records of discipline prior to September 17. Luna also testified that he would not fire any employee unless a physical threat was involved. As stated by the judge, this testimony is consistent with the Respondent's discharge of employees Juan Alvarez and Victor Mesa, who were discharged following a dispute in which they each threatened to kill the other.⁹ The judge,

⁹ In recommending dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(3) and (1) by discharging Alvarez, the judge found that the General Counsel failed to establish that the Respondent had knowledge of Alvarez' union activities. The judge also found that the timing of his discharge, immediately after his dispute with Mesa in which he told Mesa, "[T]hat's why they kill people here

however, rejected the Respondent's putative reason for firing Santana, that Santana punched Matista, and found that Santana only touched him with his finger. The difficulty here is that the Respondent's stated reason for the discharge, that Santana "punched" Matista, is not true, and since it is not true, it cannot be used to meet the Respondent's burden. Indeed, the fact that the Respondent put forth a false reason for Santana's discharge supports a finding that the discharge was for unlawful reasons. It is well settled that, where an employer's stated motive is found to be false, an inference may be drawn that the true motive is an unlawful one that the employer seeks to conceal. *Doctors' Hospital of Staten Island*, 325 NLRB 730 (1998), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Accordingly, we find that the Respondent did not establish that it would have terminated Santana even absent his protected union activity, and that the Respondent terminated Santana in violation of Section 8(a)(3) and (1).

ORDER

The National Labor Relations Board orders that the Respondent, J.R.L. Food Corp. d/b/a Key Food, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or activities or about their cooperation with the Board's investigation.

(b) Threatening employees with discharge or a reduction in their work hours because of their union activities or support.

(c) Directing employees not to join or support the Union.

(d) Directing employees to report on the union activities of their fellow employees.

(e) Discharging or otherwise discriminating against any employee for supporting Local 1500, United Food and Commercial Workers Union, AFL-CIO or any other union.

(f) Reducing employees' hours because they supported Local 1500, United Food and Commercial Workers Union, AFL-CIO or any other union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ruddy Rodriguez, Juan Rodriguez, Alba Cortes, Cupertino Luna, and Jorge Santana full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Ruddy Rodriguez, Juan Rodriguez, Alba Cortes, Cupertino Luna, and Jorge Santana whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bronx, New York, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

and that's what's going to happen to you if you keep bothering me," was consistent with the Respondent's stated reason for the discharge, namely the threat to Mesa.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities or the union support or activities of other employees or about your cooperation with the Board's investigation.

WE WILL NOT direct employees not to join or support the Union.

WE WILL NOT direct you to report on the union activities of other employees.

WE WILL NOT threaten to discharge you or to reduce your work hours because you join or support Local 1500, United Food and Commercial Workers Union, AFL-CIO or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 1500, United Food and Commercial Workers Union, AFL-CIO or any other union.

WE WILL NOT reduce your hours for supporting Local 1500, United Food and Commercial Workers Union, AFL-CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Ruddy Rodriguez, Juan Rodriguez, Alba Cortes, Cupertino Luna, and Jorge Santana full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ruddy Rodriguez, Juan Rodriguez, Alba Cortes, Cupertino Luna, and Jorge Santana whole for any loss of earnings and other benefits resulting from

their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Ruddy Rodriguez, Juan Rodriguez, Alba Cortes, Cupertino Luna, and Jorge Santana, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

J.R.L. FOOD CORP. D/B/A KEY FOOD

Jessica Drangel, Esq. and Mindy E. Landow, Esq., for the General Counsel.

S. Michael Weisberg, Esq., for the Respondent.

Patricia McConnell, Esq. (Vladeck, Waldman, Elias & Engelhard, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in New York, New York, on January 11, 12, and 14 and February 8-9, 1999. The charges were filed by Local 1500, United Food and Commercial Workers Union, AFL-CIO (the Union, or UFCW), on various dates between August 7 and December 4, 1998.¹ Based on these charges, an Order further consolidating cases, consolidated complaint and notice of hearing issued on December 28. The consolidated complaint was further consolidated and amended at the hearing on January 14, 1999. The consolidated complaint, as amended, alleges that the Respondent, J.R.L. Food Corp. d/b/a Key Food, violated Section 8(a)(1) and (3) of the Act during the course of the Union's campaign to organize the Respondent's employees who worked at its store located at 3515 Jerome Avenue in the Bronx. The Respondent filed an answer to the complaint on January 6, 1999, which it amended at the hearing, denying the unfair labor practice allegations.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a retail grocery store at 3515 Jerome Avenue, Bronx, New York, where it annually derives gross revenues in excess of \$500,000 and purchases and receives goods, supplies, and materials valued in excess of \$5000 directly from firms located outside the State of New York. The Respondent did not specifically admit or deny these facts alleged in the consolidated complaint. Pursuant to the Board's Rules and Regulations, Section 102.20, the Respondent's failure to answer these allegations is deemed an

¹ All dates are in 1998 unless otherwise indicated.

² The General Counsel's unopposed motion to correct the transcript is granted.

admission. Accordingly, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find further, based on the testimony of the Union's director of organizing, Eduardo Cordero, that the Union is an organization in which employees participate and which exists for the purpose, at least in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Accordingly I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Ruben Luna and his brother, Jaime, are the sole shareholders of the Respondent. In addition to the Jerome Avenue store, the Luna brothers own three other supermarkets in New York City under different corporate entities, i.e., another Key Food at 1718 Madison Avenue that they have owned for 14 years; a store at 3632 Broadway (at 150th Street); and a C-Town at 3550 Broadway (at 145th Street), that the Luna brothers opened in August. Although the Luna brothers make all decisions affecting the four stores together, it appears that they have divided responsibility for the day-to-day operations of the stores equally, each responsible for two stores. Ruben Luna is primarily responsible for the Key Food on Jerome Avenue involved in this proceeding.³ The Respondent acquired that facility on January 12 from an unidentified prior owner. Cordero, the Union's organizing director, testified that the Union represented the employees at this store under the prior ownership. Although the record reveals that the Respondent retained at least some of the employees who worked under the previous owners, there is no allegation that the Respondent was a successor with an obligation to recognize and bargain with the Union.

The Respondent employs approximately 35–40 employees at the Jerome Avenue store. Luna is present in the store virtually every day for at least part of the day. He has an office in the front of the store by the cash registers. Manuel Matista is the Respondent's general manager and an admitted supervisor. Matista opens and closes the store, handles the money, and supervises the front end of the store, including the cashiers. He has the authority to make decisions in Luna's absence. Rene Questo was identified at the hearing as the floor manager. He is responsible essentially for the back end of the store, ordering the merchandise and overseeing employees who stock the shelves. Questo became the floor manager in August after the previous floor manager, Victor Manuel Mesa, was terminated. Before that, Questo was an assistant floor manager. Jose Rivera has been employed by the Respondent since the store opened, also as an assistant floor manager. The assistant floor managers act for the floor manager in his absence. In addition, they oversee the employees who handle the merchandise, unloading deliveries and stocking shelves. They decide where employees are to work and make sure the work gets done. They communicate instructions from Luna or Matista to the employees.

³ Although Jaime Luna is alleged in the complaint as a supervisor/agent of the Respondent, there is no evidence in the record that he was involved in any of the alleged unfair labor practices. Accordingly, all references in this decision to Luna refer to Ruben Luna.

The General Counsel alleged in the consolidated complaint that, at all material times, Questo was a statutory supervisor and/or agent and that Rivera was an agent of the Respondent. The Respondent, in the two answers it filed before the hearing, did not admit or deny these allegations, effectively admitting them. See Section 102.20 of the Board's Rules and Regulations. At the hearing, the Respondent denied that either Questo or Rivera had any authority to speak or act on behalf of the Respondent. I permitted the Respondent to amend its answer at this late stage of the proceedings because the Respondent's counsel was ignorant of Board law and procedure and apparently did not understand the significance of the allegation and his failure to specifically answer it. The Board has held that a nonsupervisory employee will be found to be an agent of the employer and the employer will be liable for his actions where the evidence establishes that the individual had apparent authority to act for the Respondent. Apparent authority exists where the employer has placed the individual in a position where employees "would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management." *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 (1997); *Southern Bag Corp.*, 315 NLRB 725 (1994); and *Great American Products*, 312 NLRB 962 (1993), and cases cited therein. Under Section 2(13) of the Act, the question whether specific acts performed by an agent were actually authorized or subsequently ratified is not controlling. Having considered the evidence in the record, I find that Questo and Rivera were at least agents of the Respondent during the summer when the incidents involved here took place. Although they did not have authority to hire, fire, or discipline employees, they occupied positions where the employees who unload deliveries and stock the merchandise would reasonably believe that they acted and spoke for management. The employees received their assignments from the assistant floor managers who checked their work to make sure they did what they were told. Employees also received instructions and orders from Luna through the assistant floor managers. The circumstances surrounding the particular incidents involving Questo and Rivera contained additional indicia of agency status that will be discussed in more detail below.

As noted above, the Union represented the employees at this store before the Respondent acquired it. After the Respondent began operations there, the Union attempted to obtain recognition as the collective-bargaining representative of its employees. Cordero testified that he went to the store in late January, introduced himself to Ruben Luna, advised him that the Union represented the employees of the previous owner and asked Luna to sign a recognition agreement. Luna responded by saying that he had just taken over the store and needed time to get settled. Cordero agreed to come back in a week. According to Cordero, when he returned the following week and again requested that Luna sign a recognition agreement, Luna told Cordero that he really did not want to deal with the Union in any way, shape, or form. Luna told Cordero that a representative of another local of the UFCW that represented meatcutters had also asked for recognition and that Luna told them the same thing. Cordero recalled that Luna indicated a willingness to talk to Cordero, even though he didn't want to sign a recognition

agreement, because Cordero had shown him respect. Luna asked for more time to think about it. Cordero returned about a week later with a proposed recognition agreement and a breakdown of the Union's fringe benefit fund contributions. Luna again asked for more time, saying that he wanted to review this information with his attorney.

According to Cordero, he returned on or about February 13, at which time Luna told him that he did not want to deal with the Union for all his employees, but he was willing to sign an agreement covering five employees. The five identified were Luna himself and a few relatives. Cordero told Luna that the Union could not do this, but he was willing to consider giving Luna a break by gradually signing up the employees over a period of time. Luna told Cordero that he could not afford to have all his employees in the Union and insisted that he would only agree to cover five employees. Cordero told Luna that, if he would not voluntarily sign a recognition agreement, that the Union would undertake other means of obtaining recognition. Although the Union made one last attempt in mid-April to convince Luna to sign a recognition agreement, Cordero testified that it was after this meeting in mid-February that the Union began trying to organize the Respondent's employees. Luna did not contradict Cordero's testimony regarding these meetings in any respect. He also acknowledged that he refused to recognize the Union on a voluntary basis.

The Union's organizing campaign apparently started slowly and took some time to get going. Cordero testified that Fernando Perez, the primary organizer assigned to the store, began meeting with employees in about mid-April, but that no union authorization cards were distributed until July. He explained that the reason for this was that the Union did not want to solicit signatures on cards until it was satisfied that there was sufficient interest among the employees in being represented by the Union. Cordero's testimony was corroborated by Perez who testified that he began meeting with employees at the end of April and that he did not start distributing cards until after he had educated the employees about the Union and their rights. Perez testified that he met with employees outside the store, either in one of two nearby parks or at a restaurant in the neighborhood. All of the union authorization cards that are in evidence were signed on and after July 25.

The testimony of General Counsel's witnesses indicates that Luna began communicating with his employees regarding the Union even before Cordero first sought recognition. Jorge Ordoñez, a reluctant witness who had been employed at this store for 2-1/2 years at the time he testified, recalled that Luna told him during his interview in January that he did not work with the Union and that, if the Union came to the store, Ordoñez should say he was not interested.⁴ Similarly, Alba Cortes, who

worked for the prior owner and was hired by the Respondent as a cashier, testified that Luna told her when she was hired that he did not want anyone from the Union and that, if anyone was to ask her, to tell them she was related to him. Luna did not specifically deny making these statements. In February, about the time that Cordero was seeking recognition, Luna told Jorge Santana, the Respondent's produce manager until he was terminated on December 1, that the union guy was around and that, if they approached Santana, to say no. Juan (Johnny) Alvarez, another alleged discriminate, testified that he learned from Santana, in February, that the Union was trying to get into the store. Apparently, Santana relayed the information he got from Luna to Alvarez. Alvarez further testified that Luna approached him in March and gave him the same instruction he had given to Santana, that if the Union asked Alvarez to be in the Union, he should say no. Although Luna denied generally that he spoke to any employees about the Union, he did not specifically deny this testimony. I find the testimony of these witnesses to be credible and consistent with each other. Although the General Counsel does not specifically allege that any of these conversations were unlawful, I find that this series of conversations establishes the Respondent's opposition to the Union, setting the stage for its later actions.

It appears from the testimony of Santana, Alvarez, and Cortes, that the employees first became aware of the Union's attempts to obtain recognition in about February. As noted above, Luna himself told the employees that the union was around and the employees discussed it amongst themselves. The testimony of the witnesses indicates that serious discussions about joining the Union did not occur until June or July. At that time, Juan Rodriguez, who was employed as a utility person, performing duties in various departments, including some security functions, invited Ruddy Rodriguez to meet the union organizer.⁵ Juan and Ruddy met Union Organizer Perez at the Caridad restaurant on July 25 and signed cards that day. They then approached Alvarez, who signed a card on July 27, and Jorge Santana, who signed on July 30. Around the same time, Cupertino Luna encountered Perez on the street near the store and was given a card, which he signed on July 27. Perez testified that he designated Juan and Ruddy Rodriguez, Alvarez, Santana, and Virgilio Peña, who worked in the meat department, as his organizing committee. Juan Rodriguez, Ruddy Rodriguez, and Santana testified that they were given cards by Perez that they distributed to other employees. Their testimony in this regard was corroborated by other employees, including Alex Duran and Olga Caraballo, who are still employed by the Respondent, and both of whom I found to be very credible witnesses.

According to the General Counsel's witnesses, soon after the employees began signing cards, Luna began interrogating them in an effort to find out who had joined the Union. Ordoñez testified that Luna asked him, on August 4, at about 11 in the morning while he was working alone in the produce section, if anyone had spoken to him about the Union. Ordoñez said, "[N]o." The next day, at around 10 a.m., Luna approached Ordoñez again, in the same place, and asked Ordoñez if anyone

⁴ The General Counsel was able to elicit this testimony from Ordoñez by using his affidavit to refresh his recollection. Ordoñez only appeared at the hearing after the General Counsel obtained an order from the district court enforcing the subpoena served on him. I noted that Ordoñez appeared reluctant to provide any testimony that was adverse to the Respondent, his current employer. Under these circumstances, I consider such testimony to be inherently credible. See *Flexsteel Industries*, 316 NLRB 745 (1995); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), *enfd.* as modified 308 F.2d 89 (5th Cir. 1962).

⁵ Juan and Ruddy Rodriguez are not related.

had spoken to him about the Union. Ordoñez again responded in the negative. Luna then asked Ordoñez if he knew who was in the Union. Ordoñez replied that he did not, but that maybe Ruddy [Rodríguez] would have the names of the people in the Union. During cross-examination by the Respondent's counsel, Ordoñez testified that Luna told Ordoñez that he did not care if Ordoñez joined the Union, that he liked the way Ordoñez worked. The record reflects that Ordoñez was promoted to produce manager after Santana was terminated and that he received an increase in pay. Luna's denial that he interrogated any employees on August 4 and 5 was elicited in response to leading questions from counsel. Luna also testified that Ordoñez approached him to complain that Santana was pressuring him about the Union. Luna claims that he told Ordoñez that he liked Ordoñez' work, that it was Ordoñez' decision whether to sign with the Union or not, and that Luna would not fire him for that. I have already found above that Ordoñez was a credible witness to the extent he gave testimony adverse to the Respondent. His testimony meant to negate the seriousness of the interrogation was far less credible, considering Ordoñez' obvious desire not to bite the hand that fed him with a promotion and wage increase. In general, I did not find Luna to be a very credible witness. In making this credibility resolution, I note that Luna attempted to mislead the court by claiming that one of the witnesses who was under subpoena by the General Counsel had quit, when in actuality the witness, Alex Duran, was employed and working on the day in question. Accordingly, I find, based on Ordoñez' testimony on direct examination, that Luna did interrogate him on August 4 and 5 regarding his and other employees' union activities. Ordoñez was not an open union supporter at the time of Luna's questioning. Under all the circumstances, including the fact that the owner of the Respondent was questioning an employee in his work area in an attempt to identify union supporters, I find that this interrogation was unlawful under the test adopted by the Board in *Rossmore House*⁶ and *Sunnyvale Medical Clinic*.⁷ Accord: *Hudson Neckwear*, 302 NLRB 93, 95 (1991).

Alex Duran testified that he was working in the dairy department on the morning of August 5 and had a conversation with Ruddy Rodríguez who had come to the store on his own time. Duran had asked Ruddy what time he was coming to work and Ruddy told him at 2:30 p.m. After this conversation, at about 11:30 that morning, Luna approached Duran and asked him if Ruddy talked to him about the Union. Duran said, "[Y]es, but that he (Duran) didn't know what the union was about." Luna left and returned about 5 minutes later and said to Duran, "[T]his conversation was only between us." Duran also appeared at the hearing only as a result of subpoena enforcement proceedings. As noted above, he still works for the Respondent, despite Luna's representation in open court that Duran had quit. Luna denied this allegation in response to a leading question from his counsel. I find that Duran's testimony regarding this conversation is far more credible than Luna's denial. Because of the identity of the questioner, the location of

the interrogation, the nature of the information sought and Duran's status as an employee who had not revealed his union sympathies, I find that this interrogation was also unlawful.

Juan Rodríguez testified that, on the morning of August 5, Luna questioned him about the Union as well. According to Rodríguez, he was in the back room where the merchandise is stored when Luna came out of the bathroom and asked if Ruddy had spoken to him about the Union. Rodríguez said, "No" and Luna said, "[O]kay, nothing happened." Luna also denied this allegation by responding to leading questions from counsel. Because Luna's interrogation of Juan Rodríguez in the morning is similar to the other incidents of interrogation found above, I credit Juan Rodríguez that Luna interrogated him in the morning by asking if Ruddy had spoken to him about the Union. For the reasons discussed above, this interrogation was likewise unlawful.

The complaint alleges that the Respondent unlawfully terminated two employees, Ruddy Rodríguez and Juan Álvarez, on August 5, the same day that Luna unlawfully interrogated Ordoñez, Duran, and Juan Rodríguez. Ruddy Rodríguez had been employed by the Respondent since May stocking shelves. Ruddy Rodríguez testified that, when he was hired, Luna told Rodríguez that he needed someone to work part time. Rodríguez told Luna he would be able to work full time in the summer, but would have to go back to part time when school started in the fall. According to Rodríguez, Luna said, "[O]kay." Rodríguez further testified that he was accepted to community college to begin in the fall and that he had asked Luna for a day off in July to go to the college to register and that Luna gave him the day off. Ruddy Rodríguez usually worked in aisle 3. He identified Juan Álvarez as his supervisor at the beginning of his employment. According to Ruddy, Álvarez was replaced as his supervisor by Victor Mesa sometime in June or July.⁸ As noted above, Ruddy became involved in the Union's organizing campaign in July, at the invitation of Juan Rodríguez, and he signed a card on July 25. I credit Ruddy's testimony that he also distributed cards and talked to his fellow employees about the Union because his testimony in this regard was corroborated by other witnesses, including Alex Duran.

According to Ruddy Rodríguez, he went to the Respondent's store on the morning of August 5 to talk to Mesa about a work assignment that he did not complete the day before. Mesa told him that the store was very busy and that he might need Ruddy to work that day. Mesa said he was going to talk to Luna and would let him know. Shortly thereafter, Mesa returned and told Ruddy to come in at 2 p.m. While he was in the store that morning, Ruddy apparently talked to Alex Duran. As noted above, Luna interrogated Duran about his conversation with Ruddy. Also, as noted above, Ordoñez told Luna that same morning that Luna should ask Ruddy if he wanted to know who was in the Union. Ruddy Rodríguez testified further that he

⁶ 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

⁷ 277 NLRB 1217, 1218 (1985).

⁸ Álvarez testified that he was demoted and Mesa became the supervisor in March. Because Ruddy Rodríguez, who did not start working for the Respondent until May, testified that Álvarez was his supervisor in the beginning, I find that his recollection is more accurate than that of Álvarez. In addition, payroll records of the Respondent indicate that Mesa began working for the Respondent during the payroll period ending July 17.

returned to the store at 1:45 p.m. and, on his way to punch in, was stopped by Luna. Luna made a comment about his nephew, Kelvin Luna, who was stocking shelves in Ruddy's aisle. Ruddy had been working with Kelvin for a few days before this conversation.⁹ Luna then told Ruddy that the store was not real busy and that he did not need Ruddy to work. According to Ruddy, Luna told him that he would probably need Ruddy in a new store that he was about to open and Ruddy responded, "[A]ll right, just let me know when you open your new store." Luna told Ruddy that he would need him to work from 9 a.m. to 9 p.m. Ruddy told Luna that he could not work those hours because he would be starting college. Luna told Ruddy that was all he had available. Luna then asked the secretary for "Ruddy's things," counted out some money, gave it to Ruddy and said, "[T]hat's your pay until Saturday. Call me Sunday and we'll discuss it." Ruddy left the store, but returned that evening to pay off a debt he owed to one of the cashiers, Abdul. According to Ruddy, Luna came out of the office and walked around near the cashiers but did not speak to him. Ruddy Rodriguez admitted that Luna did not tell him he was "fired" on August 5. He further admitted that he did not call Luna that Sunday or anytime thereafter to discuss his employment.

Alex Duran testified that he saw Ruddy in the store around 2 p.m., saying goodbye to employees in the deli. According to Duran, he told Ruddy about Luna's earlier interrogation of him about Ruddy's union activities. Ruddy told Duran that Luna had fired him. In contrast, Ruddy recalled that Duran called him at home that night to tell him about Luna's interrogation. He did not testify that he talked to Duran in the store that afternoon. Juan Rodriguez testified that Ruddy came to the park while he and other employees were having lunch that afternoon and told them that Luna had fired him because of the Union. Juan Rodriguez testified further that, when he returned from having lunch in the park, Luna met him at the door and asked him who he was talking to in the park. Juan Rodriguez replied, "[W]ith Ruddy." Luna then asked what they were talking about and Juan Rodriguez told Luna they were talking about how Luna had fired Ruddy because of the Union. According to Juan Rodriguez, Luna then asked who else was in the park and Juan told Luna that Virgilio Peña, Olga Caraballo, Alex Duran, Johnny Alvarez, and Jose were there. Soon after this conversation, Luna approached Juan Rodriguez in the produce area and told him that he should not speak to Ruddy and that he should not get into the Union. When Juan Rodriguez did not respond, Luna told him to go to work. Ruddy Rodriguez testified that Juan Rodriguez also called him that night to tell him that Luna had interrogated Juan Rodriguez about his lunchtime conversation with Ruddy. Juan Rodriguez did not corroborate Ruddy in this regard. The General Counsel also offered the testimony of Ruddy Rodriguez' cousin, Gustavo Jimenez, that he overheard Luna telling Abdul, while Abdul was working at his cash register at about 2 p.m., that he had fired Ruddy because he was in the Union. Jimenez further testified that he heard Luna tell Abdul that if Ruddy tried to talk to him about the Union, that Abdul should say he was not interested. Abdul did not testify.

⁹ The Respondent's payroll records show that Kelvin Luna began his employment with the Respondent during the week ending August 7.

Ruddy Rodriguez testified that his cousin told him about the conversation he overheard between Luna and Abdul when he returned home that evening. Ruddy Rodriguez testified further that Jorge Santana also called him that evening to tell Ruddy that Luna had interrogated Santana about Ruddy's union activities. Santana did not testify to any such interrogation. Ruddy Rodriguez testified that he did not call Luna on Sunday, as instructed, because of the information he received from his cousin, Jimenez, and these other employees which led him to believe he had been fired.

When Ruben Luna was first asked by the Respondent's counsel if he fired Ruddy Rodriguez, Luna replied, "[W]e fired him, he couldn't follow the schedule, because he has Kung Fu with—he told me that he would not leave the Kung Fu classes for work. So he could not follow up the schedule and I said maybe I'm going to transfer you to the other store. Call me on—I think I told him Sunday, or Monday. He never called me." When counsel asked again if Luna fired Ruddy Rodriguez, he replied, "[N]o, not at all," and said that he was willing to let Rodriguez work in the other store if he had called. Luna denied any knowledge of Ruddy Rodriguez' union activities until he saw him leafleting outside the store after August 5. Luna admitted replacing Ruddy Rodriguez with his nephew, Kelvin Luna, who was also a student. When pressed on cross-examination to provide details regarding Ruddy's refusal to work because of Kung Fu classes, Luna could not recall when the conversation occurred, or what hours were in dispute. Ruddy Rodriguez acknowledged that he was taking Kung Fu classes, but denied that they interfered with his work schedule at the Respondent's store.

The General Counsel alleges that the Respondent terminated Ruddy Rodriguez on August 5, in violation of Section 8(a)(3) of the Act, because of his union activities. In order to establish a violation of Section 8(a)(3) of the Act, the General Counsel must prove, by a preponderance of the evidence, that union activity was a motivating factor in the Respondent taking adverse action against an employee. To establish this *prima facie* case, the General Counsel must prove that the Respondent had knowledge of the employee's union activities or sympathies, had antiunion animus and took action against him because of this. Only if the General Counsel meets his *prima facie* burden does the burden shift to the Respondent to show that it would have taken the same action even in the absence of union activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 988 (1982), approved by *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Because there seldom is direct evidence of unlawful motivation, the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive may be drawn. See *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), *enfd.* 837 F.2d 575 (2d Cir. 1988).

The evidence offered at trial establishes that Ruddy Rodriguez was active in support of the Union. Based on the credited testimony regarding Luna's conversations with Duran, Ordoñez and Juan Rodriguez on August 5, I find, contrary to Luna's denials, that the Respondent was aware of Ruddy's union activities on August 5. The unlawful interrogation and the other violations of Section 8(a)(1) to be found, *infra*, establish the

Respondent's animus. Ruddy Rodriguez' last day of work in the Respondent's Jerome Avenue store coincided with Luna's awareness of his union activities. The real issue with respect to Ruddy Rodriguez is whether he was terminated on August 5. Rodriguez himself acknowledged that Luna did not tell him he was terminated. He testified instead that he thought he was terminated based on what others told him. As noted above, there were discrepancies in the testimony of the General Counsel's witnesses regarding what they told Ruddy Rodriguez and when. Nevertheless, I find that there is sufficient credible evidence in the record to establish that Ruddy Rodriguez was aware, by the evening of August 5, that Luna had been interrogating other employees about his union activities. I also find that Ruddy himself told other employees that he had been fired, even though Luna never used those words, because that is what Ruddy believed happened when Luna told him he did not need him in the store anymore and gave him his pay.¹⁰ I do not attach any weight to the testimony of Jimenez regarding what he allegedly overheard Luna tell Abdul. The General Counsel never called Abdul to testify to corroborate Jimenez. Moreover, from Jimenez description of the alleged conversation and his location, it appears unlikely he could have overheard such a conversation.

The Board and the courts have held that the test of whether an employee was discharged depends upon the reasonable inferences that employees could draw from the language used by their employer. *NLRB v. Downslope Industries*, 676 F.2d 1114 (6th Cir. 1982); *Quality Pallet Systems*, 287 NLRB 1192 (1988). On August 5, Luna told Rodriguez that he did not need him in the store on Jerome Avenue and that he might need him in another store that was not yet open. He also told Rodriguez that the only hours he had available at the new store were hours he knew Rodriguez could not work because of school. Luna then gave Rodriguez his final pay. Although Luna told Rodriguez to call on Sunday to discuss working in the other store, it was reasonable for Rodriguez to infer that he would no longer be working for the Respondent on Jerome Avenue and that it was unlikely that there would be work for him at the new store unless he could work full time. Moreover, Luna essentially admitted to Cordero, in a conversation they had while the Union was leafleting the store, that Luna did not want Ruddy in the other store because he feared that Ruddy would start the union business there. Under these circumstances, it would have been futile for Rodriguez to call Luna that Sunday. I conclude that Luna in fact terminated Ruddy Rodriguez on August 5. In reaching this conclusion, I note that Luna himself volunteered at the hearing that "we fired [Ruddy]." I discredit Luna's claim that the reason he fired Rodriguez was because Rodriguez refused to give up Kung Fu classes to work his scheduled hours. It was Rodriguez' college classes which prevented him from working the only hours that Luna offered him at the unopened store. I further find that Luna offered Rodriguez these hours knowing that he could not work such a schedule and that he took these actions because of Ruddy's efforts to sign up his fellow employees for the Union. Accordingly, I find that the

¹⁰ I note that August 5 was a Wednesday, which is not payday for the Respondent's employees.

Respondent violated Section 8(a)(1) and (3) of the Act by terminating Ruddy Rodriguez on August 5.

There is no dispute that the Respondent terminated Juan, or Johnny, Alvarez on August 5. The General Counsel alleges that Alvarez' termination violated Section 8(a)(3) of the Act. The Respondent contends that Alvarez was terminated because he threatened a manager. Alvarez had been employed by the Respondent since the store opened. As noted above, he was initially a supervisor, in charge of the employees who stocked the shelves, but was replaced by Mesa in about July. Luna testified that he removed Alvarez from his supervisory job because he had too many problems with other employees. Whatever the reason, it appears that there was some hostility between Alvarez and Mesa after this change in status. Alvarez testified that he first heard about the Union in February when Santana told him that the Union was trying to get into the store. Alvarez testified further that Luna told him in March to say no if the Union asked him to join. Alvarez apparently did not get involved with the Union until July when Ruddy Rodriguez asked him, in one of the aisles of the store, if he would sign a union authorization card. Alvarez did not sign the card until 2 days later, in the park. His card is dated July 30. There is no evidence that Alvarez engaged in any other activities on behalf of the Union before he was terminated. Alvarez testified that, on August 5, Luna called him to the office at about 9 p.m. and asked him if he had signed the union card. When Alvarez said yes, Luna said that Alvarez knew that Luna did not want the Union inside his store. According to Alvarez, Luna told him he couldn't work anymore. Alvarez recalled Luna telling him that he was sorry, that Alvarez was a very good worker, but there was nothing else he could do. Luna then paid him in cash and told Alvarez "to go collect." According to Alvarez, he responded to this news by saying, "[T]hat's fine." Although Alvarez testified on direct examination that he was given no reason for his termination, other than his having signed a union card, on cross-examination Alvarez acknowledged that he was terminated the same day that he had a "disagreement" with Mesa.¹¹ Alvarez also acknowledged that his last disagreement with Mesa occurred while they were unloading a truck when he took issue with the way Mesa was speaking to him. Alvarez denied that he ever threatened Mesa and further denied that he ever carried any weapons to work.

Alvarez' responses on cross-examination tended to corroborate the testimony of the Respondent's witnesses regarding the reason for Alvarez' termination. The Respondent's general manager, Manuel Matista, testified that Alvarez and other employees were helping him and Mesa to unload a truck with merchandise. According to Matista, Alvarez and the others were taking the lighter merchandise and leaving the heavy items, like sugar, on the truck. At one point, Mesa suggested to Alvarez that he take a stack of sugar and Alvarez refused, muttering something. Mesa again asked Alvarez, on another trip out to the truck, if he would take the sugar. This time, accord-

¹¹ Although Alvarez backtracked on redirect examination, testifying that he did not remember whether he was terminated on the same day as his last disagreement with Mesa, I find that his initial answer was more candid and closer to the truth.

ing to Matista, Alvarez said, “[T]hat’s why they kill people here and that’s what’s going to happen to you if you keep bothering me.” Matista attempted to calm things down, but Mesa and Alvarez kept at one another until Matista sent Alvarez into the store to work elsewhere. According to Matista, he reported this incident to Luna. Jose Rivera, who was employed by the Respondent as an assistant floor manager at the time, corroborated Matista regarding this incident. Mesa is no longer employed by the Respondent and did not testify. Luna testified that he terminated Alvarez for threatening Mesa while they were unloading a truck. According to Luna, Alvarez had previously been warned about threatening people. Luna testified that, on the day Alvarez was fired, it was Mesa who complained to Luna. Luna testified that when Mesa told him that he was going to come to work prepared for Alvarez, he decided to terminate both Mesa and Alvarez to avoid violence in the store. I do not credit Alvarez’ testimony that he saw Mesa working in the store after he was terminated. The Respondent’s payroll records in evidence do not show that Mesa was paid after the week ending August 7. No other employee who was working after August 5 testified to seeing Mesa working in the store.

The complaint alleges that the Respondent unlawfully interrogated Alvarez on August 5 when Luna allegedly asked Alvarez, just before he was fired, if he signed a union card. Luna did not specifically contradict Alvarez’ testimony regarding the conversation in the office at the time he was fired. Luna did generally deny having any conversations with any employees about the Union and he specifically denied the 8(a)(1) violation alleged in the complaint that was based on Alvarez’ testimony. Although I have found above that Luna was generally not a very credible witness and attach very little weight to his general denials, I was equally unimpressed with Alvarez’ demeanor. He did not impress me as being entirely truthful regarding the facts surrounding his termination. After feigning ignorance of any reason for his termination on direct examination, he acknowledged having several “disagreements” with Mesa, including one on the day he was fired, then attempted to retract this admission on realizing its significance. My doubts about his credibility regarding his termination also cause me to doubt his credibility regarding the alleged interrogation. Because I do not believe that Luna asked Alvarez whether he signed a card for the Union, I shall recommend dismissal of this allegation of the complaint.

Applying the Board’s *Wright Line* test to the evidence concerning Alvarez’ termination, I find that the General Counsel has not made out a prima facie case. Alvarez’ union activity was limited to signing a card on July 30. There is no evidence, other than his own discredited testimony, that the Respondent was aware of his having signed a card. Thus, the General Counsel has failed to prove knowledge, an essential element of a prima facie case. Moreover, I note that the timing of the termination is more consistent with the Respondent’s defense that Alvarez was fired because of the incident between him and Mesa than with any union activity that Alvarez may have engaged in. I also note that, when Cordero discussed Alvarez’ termination with Luna during the Union’s leafleting, Luna gave the same reason he gave at the hearing, i.e., the alleged threat to Mesa. In reaching the conclusion that General Counsel failed to

present a prima facie case of discrimination, I have considered the circumstantial evidence relied upon by the General Counsel to prove knowledge and motivation and the general lack of credibility of Luna. Nevertheless, I am not persuaded that the house of cards built by the General Counsel to prove a discriminatory motive can withstand the overwhelming evidence that a disagreement occurred between Alvarez and Mesa the day he was fired which threatened to result in violence and that the Respondent chose to rid itself of both employees before it did. Accordingly, I shall recommend dismissal of this allegation of the complaint.

Ruddy Rodriguez and Alvarez each testified that they contacted the Union on August 5, after they were terminated, and told organizer Perez what happened. Based on this information, the Union prepared a leaflet that informed the public about the Union’s campaign to organize the Respondent’s store and the termination of these two employees. The leaflet also asked the public to boycott the Respondent’s store until it recognized the Union and reinstated the two employees. Beginning about August 12, Union Representatives Cordero and Perez leafleted outside the Respondent’s store with Alvarez and Ruddy Rodriguez. The Union conducted this activity for about 2 weeks. On several occasions, the Union was leafleting at the same time that some of the Respondent’s employees were unloading trucks. The union organizers engaged in conversation with the employees and with Jose Rivera. The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act through Rivera’s statements during some of these conversations.

Cordero testified that, on or about August 14, he had a conversation about the Union with Rivera while the Union was leafleting. During this conversation, Assistant Manager Rene Questo was nearby and several employees were going in and out of the store, transporting merchandise from the truck. According to Cordero, Rivera said he had a bad experience with a different union and that he did not think that a union would be good for the workers at the Respondent’s store. When Cordero told him that his union was different and that Rivera would have a better experience with them, Rivera replied that he did not like unions and that he was at the Respondent’s store to make sure the Union did not get in. After some further conversation, Cordero recognized Rivera as someone he knew from another organizing campaign. Rivera told Cordero that he had been brought into that store, Met Foods, to stop the Union as well and that he had the same role here. Cordero further testified that Rivera told him that he had known Luna for 18 years, that he was Luna’s representative, and that he would do anything in his power to make sure the Union did not get into the store. According to Cordero, Rivera also said during this conversation that as far as he was concerned the Union was not going to get in and that any employee who wants the Union would be on the outside looking in. Cordero testified that he warned Rivera about making such statements in front of Cordero because he was leaving the Respondent open to an unfair labor practice charge. Rivera replied that was not his problem. It is unclear from Cordero’s testimony whether any employees actually heard Rivera’s antiunion statements.

Cordero testified that he also had a conversation with Luna later the same day. Cordero suggested to Luna that they sit

down and try to resolve things before they got out of hand, referring to the two discharges and the statements that Rivera had made earlier in the day. When Cordero suggested that Rivera might be hurting the Respondent's interest by the things he was saying, Luna said that Rivera was his representative and that he valued his opinion. According to Cordero, he and Luna also discussed the discharges. Luna told Cordero that he could not put them back to work because they had disrespected him and threatened some of his employees. When Cordero asked for an explanation, Luna told him that Alvarez threatened to beat up one of his managers. Cordero told Luna that was not what he heard, that he heard that Luna found out that Alvarez had signed a card and let him go. Luna denied this was the reason for Alvarez' termination, again telling Cordero that the reason he was fired was the threat. Luna then admitted to Cordero that he had spoken to Alvarez and that Alvarez knew where Luna stood regarding the Union, that he did not want the Union in the store. According to Cordero, he then asked Luna what was Ruddy Rodriguez' problem and Luna replied that Ruddy disrespected him by getting involved with the Union because Ruddy also knew that Luna did not want the Union. Cordero then asked Luna if Ruddy Rodriguez could work at the new store, because Ruddy told Cordero that Luna had offered him a transfer there. Luna replied that he was not about to transfer Ruddy to his other store because Ruddy was a bad influence on his employees and would probably start the union business at the other store. Cordero testified that most of his conversation with Rivera and Luna was in English, but that some Spanish was used. Luna did not contradict any of Cordero's testimony.

Cordero testified that the next day, August 15, while he Perez, Alvarez and Ruddy Rodriguez were again handing out leaflets, another truck was being unloaded. Rivera was again present, sorting the merchandise as it came off the truck and directing the employees who were transporting it into the store. Assistant Manager Rene Questo was also present. According to Cordero, he and Perez continued discussing the Union with Rivera in the same manner as the day before. At one point, employee Cupertino Luna,¹² who was unloading the truck, almost hit a customer with the merchandise he was transporting. Cordero warned Cupertino Luna in time to avoid a collision and Cupertino thanked him. When Cupertino came back out of the store for another load of merchandise, he again thanked Cordero. At that point, Rivera told Cupertino, in Spanish, to be careful because he is being too friendly with the Union and that, if he keeps it up, he will be in the same position as the other guys, referring to Alvarez and Ruddy Rodriguez. Cordero asked Rivera if he was threatening Cupertino because he said thank you to the Union. Rivera replied, "I'm telling him not to be friendly with you guys because, if he is, he's showing me that he supports the union, too. And if he supports the union, he's going to be out there also, or he's going to be gone." Cordero again questioned whether Rivera was threatening to cause Cupertino to be fired because he showed support for the Union and Rivera said, "[D]amn real, anyone who supports the union is going to be out on the street." Cordero testified that Perez and Rivera then got into a heated exchange and that

Cordero tried to calm the situation down. Cordero said he and Rivera continued discussing employees' rights under the law, with Rivera telling him that he did not care about the law, that his job was to protect Ruben Luna's interest and that, as far as Rivera was concerned, there was not going to be a union there and anyone who supports the Union was going to be terminated. According to Cordero, Cupertino Luna continued carrying merchandise from the truck into the store after this incident. Cordero testified that he observed Cupertino speaking to Rivera and heard Rivera tell Cupertino, "[N]ot to be too friendly with these guys because you may be joining your buddies on the picket line." Cupertino responded that whether he was working for the Respondent or someone else, he would still be working and that Rivera could not tell him not to talk to these people. Cordero testified further that Ruben Luna came out of the store at one point and told Cordero to stop interrupting his guys while they were working. Cordero then told Luna about Rivera's threat to Cupertino Luna and warned Ruben Luna that Rivera was leaving the Respondent open for an unfair labor practice charge. According to Cordero, Ruben Luna responded by saying that he valued Rivera's opinion and that, if Rivera said an employee should be out, then he would be out. Cordero testified that Rivera came over while he was talking to Ruben Luna and said that the Union was causing all the problems, that they were stopping the employees from working. Rivera said that the Union should not even be out there leafleting. Ruben Luna then told everyone to get back to work and asked Cordero not to stop his guys from working.

Perez and Cupertino Luna also testified about the incident on August 15, but in far less detail than Cordero. Their recollection of the exchange between Rivera and Cupertino Luna also differed somewhat from that of Cordero. According to Perez, Cupertino Luna said hello to him while Cupertino was unloading a truck and the Union was leafleting. Perez recalled that Rivera asked Cupertino why he was saying hello to Perez. Cupertino responded that the Union was not his enemy and asked Rivera what was the problem with saying hello to them. Perez testified that he also asked Rivera why he was questioning Cupertino's friendliness to the Union and that Rivera said that every person that Perez talked to would be fired. Perez also testified that he heard Rivera tell Cupertino Luna that he was going to tell Ruben Luna that Cupertino was with the Union and that he would be fired. Cupertino Luna testified that, one day while unloading a truck, he saw the people from the Union handing out leaflets and he said hello to Perez.¹³ Rivera then asked Cupertino Luna if he was with them. Cupertino replied that it was nothing that should interest Rivera. According to Cupertino, Rivera then said that he was going to fire him, or at least tell Ruben Luna to fire him. Cupertino told Rivera that he was not interested in whether Rivera fired him or not. Cupertino testified that it was 2 or 3 days later that he was told he was being transferred to another store. Cupertino Luna's transfer,

¹² Cupertino Luna is not related to Ruben Luna.

¹³ Cupertino Luna had previously met Perez when Perez approached him on the street and gave him a union authorization card to sign. This occurred on or about July 27.

which is alleged as a violation of Section 8(a)(3), will be discussed below.¹⁴

Rivera acknowledged talking to Cordero and Perez when they came to the Respondent's store in the summer. He disputed their version of the conversation by denying that he ever spoke to them about employees who joined or supported the Union. He recalled that Cordero and Perez asked him what he thought about the Union and that he told them that he was against the Union, that he does not like the union and "things like that." Rivera did not specifically deny speaking to Cupertino Luna about any perceived friendliness to the Union. Ruben Luna did not testify regarding any of the conversations on August 14 and 15 described by Cordero. However, he generally denied that he ever authorized Rivera to interrogate employees about the Union. I found Cordero to be an impressive witness and credit his version of the conversations he had on August 14 and 15. While there were some variations in the testimony of Perez and Cupertino Luna regarding these conversations, I ascribe this to the passage of time. I note further that Cupertino's recollection about dates and specifics was somewhat vague. Nevertheless, both he and Perez had a clear recollection, consistent with Cordero, that Rivera interrogated Cupertino when he showed friendliness to the Union's organizers and threatened him with termination if he supported the Union. Because I have found above that Rivera was an agent of the Respondent at the time of the interrogation and threats, Respondent is liable for his statements. I note that Rivera's interrogation and threats occurred at a time that he was directing Cupertino Luna in the work of unloading a truck so that he was in a position of authority over Cupertino when he made the allegedly unlawful statements. Moreover, Ruben Luna's undenied statements to Cordero, that he respected Rivera's opinion and would follow his recommendations, establishes that he had adopted Rivera's conduct, even if not initially authorized. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act on August 15 by interrogating employees and threatening them with discharge.

As noted above, the General Counsel alleges that the Respondent discriminatorily transferred Cupertino Luna to another store on August 17. The complaint also alleges that the Respondent reduced his wages as a result of the transfer. Cupertino Luna had been employed by the Respondent, stocking shelves at the Jerome Avenue store, since March 1998. He testified that he was paid \$300/week for working approximately 66 hours. It is undisputed that he was transferred on August 17 to a new C-Town supermarket that the Respondent was opening. Cupertino Luna testified that Ruben Luna warned him about the Union being "outside" and told him that if Cupertino said yes to the Union,

¹⁴ Cupertino Luna also testified to two incidents of interrogation by Jose Rivera that occurred inside the store, while he was working. According to Cupertino Luna, Rivera asked him, both times, whether he was in the Union and if he knew who was in the Union. Cupertino replied to both questions in the negative. Cupertino Luna did not recall when these incidents occurred, but did recall that both occurred between the date he signed a union card and August 15, the date of the incident described above. The General Counsel did not allege in the consolidated complaint that either of these interrogations were unlawful.

Ruben Luna would "throw him out."¹⁵ Cupertino Luna could not recall when this conversation occurred, claiming to have a poor memory for dates, but he recalled meeting union organizer Perez on the street about an hour after receiving this warning from Ruben Luna. As noted above, Cupertino Luna signed a card for the Union on July 27. He testified that he signed the card about 8 days after Perez gave it to him. Cupertino Luna also testified to two instances of interrogation by Rivera, described at footnote 14 above, and the threat described above that Rivera made to him on August 15 after he acknowledged the union organizers who were leafleting outside the store. Cupertino Luna testified that about 2 or 3 days after Rivera's threat, Ruben Luna told him that it was his last day at the Jerome Avenue store and that he was to report to work at the C-Town at 145th Street and Broadway the next day. Luna did not give him a reason for the transfer. According to Cupertino Luna, when he started working at C-Town, the store was not yet open but he and other employees were stocking shelves and getting ready for the opening. He testified that, for the first 2 weeks, he did the same work that he had done at the previous store and received the same pay. After several weeks, he was given a job in the meat department and his hourly rate was changed to \$5.15. Cupertino testified that he is now paid \$250/week at C-Town. He acknowledged that he also works fewer hours than he did at Jerome Avenue, from approximately 10 a.m. to 5 or 6 p.m. instead of 8 a.m. to 7 p.m.

Ruben Luna denied that he transferred Cupertino Luna to C-Town because of the Union. According to Ruben Luna, he did not even know that Cupertino Luna was involved with the Union. Ruben Luna testified that it is a common practice for the Respondent to transfer employees among its four stores to meet changing staffing needs. In particular, when the Respondent opened the new C-Town, it took employees from all of its stores to fulfill its needs. Ruben Luna also testified that Cupertino Luna asked Ruben Luna to work fewer hours because he was getting home too late and did not have time to spend with his family. Ruben Luna granted this request and changed Cupertino's hours to 8 a.m. to 5 p.m. Ruben Luna could not recall when Cupertino made this request. According to Ruben Luna, the reason that Cupertino is making less money is that he is working fewer hours. Cupertino testified that the only time he asked to work fewer hours was when he interviewed for the job at Jerome Avenue. According to Cupertino Luna, Ruben Luna offered him an 8 a.m. to 8 p.m. schedule and Cupertino told him that would cause him to get home too late. Ruben then agreed that Cupertino could work 8 a.m. to 7 p.m. and that these were his hours until he was transferred to C-Town.

Payroll records in evidence for the Respondent's Jerome Avenue store show that Cupertino Luna was paid \$300/week through the week ending August 14. There are no records in

¹⁵ Ruben Luna did not specifically contradict Cupertino Luna's testimony about this conversation although he generally denied threatening any employees with discharge if they supported the Union. It does not appear that the complaint alleges this conversation as an independent violation of Sec. 8(a)(1) since the dates of alleged threats in the complaint do not coincide with Cupertino's testimony regarding the timing of this threat.

evidence showing what he was paid at C-Town. The General Counsel put into evidence a letter from the Respondent's counsel, received in response to the subpoena, listing 11 employees who were transferred from store to store in the last year. This list was apparently compiled from Ruben Luna's memory because the Respondent claimed it kept no records of these transfers. This list indicates that three other employees transferred from Jerome Avenue to the C-Town (identified as 3550 Food Corp.). The Respondent did not indicate when these other transfers occurred.

Applying the Board's *Wright Line* test to the facts here, I find that the General Counsel has produced sufficient evidence to raise an inference that Cupertino Luna was transferred from Jerome Avenue to the unopened C-Town because he showed support for the Union. I note that his transfer occurred almost immediately after the unlawful interrogation and threat made by Rivera and adopted by Ruben Luna. The credited evidence regarding the incident on August 15 establishes knowledge and animus. While it is true that the Respondent did not fire Cupertino Luna, as Rivera had threatened, he was abruptly removed from the store without any explanation. The burden was thus on the Respondent to prove that Cupertino Luna would have been transferred to C-Town even absent union activity. The Respondent offered evidence to show that it is common to staff a new store with transfers. Olga Caraballo, a current employee who testified for the General Counsel, corroborated this by testifying that the Respondent transferred the entire meat department from the Madison Avenue store to Jerome Avenue when that store opened in January, before any union activity. The summary that the Respondent provided in response to the General Counsel's subpoena shows that other employees were also transferred to the new C-Town, although it does not indicate when these occurred.¹⁶ I note that Cupertino Luna testified that he had the same job at the new store and received the same pay for the first few weeks and that he was stocking shelves to get the store ready to open. While I do not doubt that the Respondent reaped a benefit to its antiunion campaign by transferring Cupertino Luna, I conclude that the Respondent has demonstrated a legitimate business reason for the transfer and that the transfer was in accordance with its customary practices. Accordingly, I find that the Respondent would have transferred Cupertino Luna to assist with the opening of the new C-Town and to staff it once opened even in the absence of union activity. Because there is no dispute that the reduction in Cupertino Luna's pay coincided with a change in his schedule which resulted in his working fewer hours a week, I find that the General Counsel has not met her burden of establishing any discriminatory motive for this action. Accordingly, I shall recommend dismissal of the allegations regarding Cupertino Luna's transfer and reduction in pay.

The consolidated complaint alleges that the Respondent terminated Juan Rodriguez on August 20. According to Juan Rod-

riguez, he started working for the Respondent in May.¹⁷ It appears from the record that he had no set duties but was assigned to work in the grocery department, the meat department or anywhere else that Ruben Luna or one of the managers needed him. There is no dispute that he also functioned occasionally as a security guard. Juan Rodriguez testified further that he met union organizer Perez in the park a couple months after he started working for the Respondent and that he signed a card for the Union at the Caridad Restaurant on July 25. As noted above, it was Juan Rodriguez who invited Ruddy Rodriguez to meet Perez and both signed cards at the same time and place. Juan Rodriguez testified that he distributed cards to other employees and regularly met with Perez and other employees in the park near the Respondent's store. Perez testified that Juan Rodriguez was a member of the organizing committee. As noted above, Juan Rodriguez testified to three conversations with Ruben Luna on August 5, the day that Ruddy Rodriguez was terminated. I have found above that Ruben Luna unlawfully interrogated Juan Rodriguez that day regarding his conversations with Ruddy Rodriguez. I find further that Ruben Luna told Juan Rodriguez on August 5, after he had fired Ruddy Rodriguez, that Juan should not talk to Ruddy and should not get into the Union.

Juan Rodriguez testified that, on his last day of work for the Respondent, Ruben Luna told him and Assistant Floor Manager Rene Questo, in the morning, that Juan now had two jobs, grocery and security. Juan then went into the backroom to get his work jacket and spoke briefly to Jorge Santana, the produce manager. Ruben Luna saw him and asked, "[W]ho are you working with, Santana or me?" Juan told Ruben he was getting his jacket and Ruben told him to stop running around and get to work or to take the day off. Juan Rodriguez testified that he observed Ruben watching him all morning until Ruben left the store, at about noon. After Ruben left the store, a truck arrived with merchandise for Santana. Rodriguez testified that Santana asked him to help unload the truck. Juan Rodriguez apparently unloaded that truck without incident. Later, when another truck arrived for Santana, General Manager Manuel Matista told Rodriguez to help unload that truck. According to Rodriguez, as he was taking a handtruck with merchandise to the back room, Rene Questo asked him what he was doing. Rodriguez told Questo that he was helping Santana. Questo replied, "[Y]ou don't work for Santana, you work in grocery." When Rodriguez said he was not working for Santana, he was working for the store, Questo told him, "[I]f you're not going to work in grocery, go get your check right now and get out." Rodriguez finished bringing the merchandise he had to the back and went back out to the truck to get more. When Questo saw him at the truck, he again said to Rodriguez, "[I]f you don't like to work in grocery, go get your check right now." Rodriguez went back into the store and saw Matista standing there with an envelope for him. The envelope contained cash representing Rodriguez' pay for the week. Rodriguez testified that Matista did not say anything to him. According to Rodriguez, he took the money and left. Rodriguez testified that he attempted to call

¹⁶ The General Counsel offered no evidence to contradict this summary. Accordingly, I have accepted it as an accurate summary of what the Respondent's records would show if it had produced payroll or other records related to these transfers.

¹⁷ The Respondent's payroll records in evidence show that the week ending June 19 is the first week Rodriguez received a payroll check.

Ruben Luna after he got home but was told by Matista, who answered the phone that Luna was not there. When Rodriguez tried to contact Luna again the following week, Matista again answered the phone and told him that Luna was not there. Rodriguez never discussed his termination with Luna. According to Rodriguez, he had received no warnings or criticism regarding his work before that last day of employment. On cross-examination, Rodriguez admitted that no one told him that he was fired or to go home.

Matista admitted asking Juan Rodriguez to help Santana unload a truck. According to Matista, everything was going fine until Rodriguez suddenly came into the store and went to the office. Matista testified that the secretary, Mildred, called him and said that Rodriguez wanted his check. Matista told Mildred to give him his check, that if he wanted to leave, he was not going to force anybody to work there. He also told Mildred to tell Rodriguez to call Luna. Matista denied that he fired Rodriguez, testifying that the only conversation he had with Rodriguez that day was when he told him to help Santana with the truck. Ruben Luna was not at the store when Rodriguez left. He testified that he learned from Matista and Mildred that Rodriguez asked for his check and left the store. He claimed to have no knowledge of Rodriguez' union activity. Neither Rene Questo nor the secretary, Mildred, testified for the Respondent. Matista acknowledged that Questo still works for the Respondent as the Floor Manager. In August, Questo was the assistant floor manager, a similar position to Jose Rivera. Although he had no authority to hire or fire, he clearly had the apparent authority to direct the work of employees such as Rodriguez. The Respondent did not explain Questo's absence at the hearing even though he is the only witness who could have contradicted Rodriguez testimony regarding the circumstances preceding his departure from the store on the day in question.¹⁸

The credited evidence in the record establishes that Juan Rodriguez was one of the more active union supporters. He enlisted Ruddy and others into the campaign and solicited other employees to sign authorization cards. The Respondent's anti-union animus is amply demonstrated by the other unfair labor practices already found above. Although Luna interrogated Juan about Ruddy's activities, there is no direct evidence that the Respondent knew that Juan was also active in the Union's campaign. The General Counsel argues that the circumstances surrounding Rodriguez' termination, including its timing, establish knowledge as well as unlawful motivation. The Board has held, with court approval, that the same circumstantial evidence used to raise an inference of unlawful motivation can be relied on to prove knowledge in the absence of direct evidence of knowledge. *Abbey's Transportation Services*, supra. See also *Montgomery Ward & Co.*, 316 NLRB 1248 (1995). The Respondent argues, as it did with Ruddy Rodriguez, that it did not fire Juan Rodriguez. The Respondent asks me to believe Matista's testimony that Juan simply stopped working and asked for his check without explanation and never returned again. I

might have an easier time accepting this testimony had the Respondent bothered to call Questo as a witness to enlighten me regarding what happened on Juan's last day of work. Because Questo is still employed by the Respondent in a managerial position and would presumably be favorably disposed to the Respondent, I shall draw an adverse inference from the Respondent's unexplained failure to call him as a witness. *International Automated Machines*, 285 NLRB 1122, 1123 (1987). Accord: *Queen of Valley Hospital*, 316 NLRB 721 (1995).

I thus credit Juan Rodriguez that Questo told him to "go get your check and get out." Juan Rodriguez did not ask for his check because he had decided to quit. Rather, he was directed to get his check by his supervisor.¹⁹ Thus, even assuming Matista's testimony that he did not hand Rodriguez his check is credible, Rodriguez' undenied testimony that Questo told him to get his check establishes that he was terminated and did not quit. I also credit Juan Rodriguez' testimony that Questo questioned him about what he was doing when he was unloading a truck and accused him of working for Santana.²⁰ It is undisputed that, at the time, Juan Rodriguez was assisting Santana in unloading a truck, a task assigned to him by Matista. Questo's questioning of Juan Rodriguez before he told him to get out was remarkably similar to Luna's questioning of Juan Rodriguez earlier that day, when he saw him in the backroom and asked, "[W]ho are you working with, Santana or me?" I infer from this that the Respondent believed that Juan Rodriguez was a union supporter because of his association with Santana. I further find that, because of the conflicting instructions he was getting from Questo and Matista that day, that the Respondent set him up in order to rid itself of a key union supporter. Accordingly, I find that the General Counsel has established a prima facie case that the Respondent terminated Juan Rodriguez because of his union activities. Respondent fell far short of meeting its *Wright Line* burden by failing to call the very supervisor who allegedly terminated Juan Rodriguez. The Respondent thus violated Section 8(a)(1) and (3) of the Act by terminating Juan Rodriguez.

Alex Duran testified that, in late August, he asked Ruben Luna for vacation time and a change in his schedule because he was going back to school. Luna granted these requests. According to Duran, Luna then asked him if Ruddy Rodriguez made him sign a union card. Duran said no. Duran and Luna then talked about how working kept Duran off the streets and out of trouble. Luna told Duran not to hang out with kids like Ruddy Rodriguez that talk about the union because they were a bad influence. Luna did not specifically deny this conversation, nor otherwise contradict Duran. This conversation is further evidence of the Respondent's animus toward Ruddy Rodriguez and the discriminatory nature of his termination.

Luna also talked to Ordoñez about the Union in mid- to late-August. Although Ordoñez initially claimed that he did not

¹⁸ Although the consolidated complaint alleges that Juan Rodriguez was terminated on August 20, the payroll records in evidence show that the last week for which he was paid by the Respondent was the week ending August 7, the same as Ruddy Rodriguez and Juan Alvarez.

¹⁹ According to the Respondent's witnesses, Questo had replaced Mesa as floor manager. Thus, he was a statutory supervisor at the time he told Rodriguez to get out.

²⁰ The Respondent admitted at the hearing that Ruben Luna was aware of Santana's union activities.

recall any such discussion, he acknowledged meeting with Luna at that time. He claimed that they only talked about the produce department. In a pretrial affidavit that Ordoñez signed under oath on September 29, however, he recorded a recollection of Luna calling him to the office around the middle of August and telling him not to let them convince him into joining the Union, to tell them that he wasn't interested. Luna also referred to the Union as rats in this conversation. Ordoñez recorded in his affidavit that, on another occasion around the middle or the end of August, he was again called to Luna's office. On this occasion, according to the affidavit, Luna told Ordoñez that he should not unite with the union employees and that, if the Respondent was forced to accept the Union, Luna would reduce the hours for the workers to a few hours so that they would quit. Luna told Ordoñez that this could also happen to him. In his affidavit, Ordoñez stated that he did not respond to these statements. Although Ordoñez claimed that he did not now recall Luna making these statements, he acknowledged telling the Board agent who drafted the affidavit these things and acknowledged swearing to the truth of the affidavit. I received this evidence as past recollection recorded over the objections of the Respondent.²¹ In light of Ordoñez' subsequent promotion and pay increase and his resistance to the subpoena which may have colored his testimony at the hearing, I find that the affidavit is a truthful and accurate record of Ordoñez' recollection on September 29, and shall credit his testimony as reflected in the affidavit. Although Luna denied, in response to leading questions, that he directed employees not to join the Union and that he threatened employees that he would reduce their hours to cause them to quit, he did not directly contradict Ordoñez' version of these meetings reflected in the affidavit. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in the consolidated complaint, by directing employees not to join the Union, and by threatening to reduce their hours in order to induce them to quit if they supported the Union.

Ordoñez did recall another occasion when he was summoned to Luna's office over the intercom and shown a form on which his name was misspelled. Ordoñez identified the Union's unfair labor practice charge in Case 2-CA-31709 as the form that Luna showed him. That charge, filed on September 11, alleges that the Respondent committed several unfair labor practices against "Jorge Edona" during the month of August. The affidavit of service indicates that the charge was mailed to the Respondent on September 16. According to Ordoñez, who does not read English, Luna read to him from the form and asked Ordoñez if he had made that statement. Ordoñez told him no, that it was a statement he made to Santana in the store. Luna also asked Ordoñez if the statements on the form were true and Ordoñez said, "[Y]es, but it was just something he told Santana in the store." After the General Counsel refreshed Ordoñez' recollection with his affidavit, he recalled that Luna also asked him whether he had come in to the Labor Board to make a statement and Ordoñez again replied, "[N]o, it was a conversation that he had with Santana." Luna then told Ordoñez not to

speak with Santana anymore because he was a bad influence for Ordoñez.²² As with most of the 8(a)(1) allegations, Luna merely denied the allegation as set forth in the complaint without directly contradicting Ordoñez' testimony regarding this meeting. Based on the credited testimony of Ordoñez, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in the consolidated complaint, by interrogating employees regarding their cooperation with the Board. Based on the date of service of the charge, I further find that this violation occurred in or about mid-September.

Alba Cortes, also referred to in the record as "Baby," is one of the employees of the former owners of the store who was hired by the Respondent. She had worked at this store as a cashier since November 1997. Cortes testified that she trained new cashiers and also worked occasionally in the deli, took phone orders and did shopping for blind customers. According to Cortes, Luna called her at home after he took over the store in January, told her he had heard that she was a good worker and asked her if she wanted to work for him. She agreed. Luna then told her that he did not want anybody from the Union there and that, if anybody was to ask her, that she should tell them she was related to him. Cortes testified that she first heard about the Union in February or March when other employees, including Santana and Ruddy Rodriguez, told her that the Union was interested in representing the employees.²³ According to Cortes, she did not get involved at that time for fear of losing her job. If Cortes' testimony is credited, her fear was understandable considering the many conversations she had with Luna in which he interrogated her and told her not to get involved with the Union. According to Cortes, Luna spoke to her "constantly" about the Union almost from her first day on the job. These conversations occurred at her register while she was working and followed the same general pattern. Luna would ask Cortes if anybody had spoken to her about the Union and if she heard anything about the Union. He would also remind her to tell anyone who asked her that she was not interested because she was a relative of the owner. According to Cortes, these conversations continued right up until she was terminated on October 22. Although Cortes could not recall the dates of any of these conversations because they were so numerous and occurred so frequently, she did recall that, in the summer, Luna asked her what she knew or heard about anybody getting involved with the Union. After her recollection was refreshed

²² The General Counsel also proved this allegation in part through Ordoñez' affidavit, which was received as past recollection recorded. For the reasons discussed above, I credit Ordoñez' recollection as recorded in the affidavit over his lack of recall at the hearing. I note that, with respect to this conversation, Ordoñez was able to recall enough of its substance to lend credibility to the earlier recorded recollection.

²³ The Respondent's payroll records show that Ruddy Rodriguez did not begin working for the Respondent until April. Ruddy Rodriguez testified that he did not get involved with the Union until June or July. Thus, Cortes could not have heard about the Union from Rodriguez in February or March. Because Santana testified that he first became aware of the Union's efforts to represent the Respondent's employees in February, it is more likely that Santana was the source of Cortes' information at that time. This is also consistent with Alvarez' testimony that he also learned about the Union from Santana in February.

²¹ *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993); *New Life Bakery*, 301 NLRB 421 (1991), enf'd. 980 F.2d 738 (9th Cir. 1992).

with her pretrial affidavit, she recalled that Luna specifically asked her to tell him if anyone spoke to her about the Union. Cortes also recalled a specific conversation by her register sometime in the summer in which Luna referred to another cashier, Nellie, as a “bitch,” telling Cortes that Nellie had betrayed him by getting involved with the Union. Cortes testified that Luna said, “[W]hat makes her think that by getting involved with the Union that he was required to give her 40 hours a week.” Luna told Cortes that he cut Nellie’s hours down to 25 a week. Cortes recalled a similar conversation, also in the summer, in which Luna referred to Santana and Ruddy Rodriguez and said that “there was no law that required him to give us 40 hours if we got involved with the Union.” Luna denied that he ever spoke to Cortes about the Union. According to Luna, it was Cortes who brought up the subject of the Union, telling him not to worry because she would never “play dirty with the Union.” Luna also specifically denied the complaint allegations that were based upon Cortes’ testimony by responding to leading questions from counsel.

Although I found Cortes’ testimony regarding the frequency and duration of these conversations somewhat exaggerated, several of the statements she attributed to Luna were consistent with statements he made to other witnesses, such as Duran and Ordoñez, whom I found to be very credible. As previously noted, Luna did not impress me as a very credible witness and I find his categorical denials unpersuasive. Moreover, it appears from Luna’s testimony that he liked Cortes, considered her a friend and was surprised to learn after her termination that she signed a union card. Under these circumstances, it is not surprising that Cortes would have been a frequent target of Luna’s interrogation and antiunion statements. I also note that Respondent’s counsel, in a letter submitted to the Board during the investigation, expressed the opinion that it was not unlawful for an employer to question employees about their support for a union. It is clear from the testimony of Cortes and the other witnesses whom I have already credited, that Luna shared this opinion. Accordingly, I find that Luna did interrogate Cortes, on more than one occasion, in an attempt to determine whether she had been approached by other employees about the Union and who was involved in the Union. Because Cortes had not openly demonstrated her support for the Union prior to this questioning and because the questioning sought to elicit information about the union activities of others, this interrogation was unlawful under the test adopted by the Board in *Rossmore House*, supra, and *Sunnyvale Medical Clinic*, supra. I further find that, as he did with Ordoñez, Luna threatened Cortes that he would reduce employees’ hours if they supported the Union. Such a threat was implicit in his statements to Cortes that he was not required to give employees 40 hours and that he had reduced the hours of another cashier because she betrayed him by getting involved with the Union. Luna’s repeated reminders to Cortes to tell anyone who asked that she was not interested in the Union and that she was related to him were coercive because they occurred in the context of unlawful interrogation and threats. Such directions, from the boss of the store, would have the reasonable tendency to restrain and coerce any employee in the exercise of his or her right to choose whether to join the Union. Finally, I find that Luna did ask Cortes to report

to him if any employees approached her about the Union, even though Cortes’ recollection of this instruction had to be refreshed with her affidavit. Considering the passage of time and the number of conversations she had with Luna on the subject, it is not surprising that she would not remember everything that Luna said. I note that such an instruction is consistent with the overall view of Luna that emerges from the record, i.e., that he was opposed to the Union, did not want any of his employees to join with the Union and was vigilant in seeking information to determine who was involved with the Union.

Cortes testified that she was given several union authorization cards by Santana, beginning in February, that she did not sign. According to the Union’s own witnesses, the card-signing campaign did not begin until June or July. In addition, Santana testified that he did not begin distributing any cards until June. Cortes testified further that she finally signed a card, which she also received from Santana, in August or September. According to Cortes, Santana gave her this card in the store, she signed it later that day or the next, and gave it back to him outside the store the next day. The card in evidence that bears her signature, however, is dated October 8.²⁴ According to the testimony of Cordero and Perez, the initials on the back of the card indicate that she gave the card to Santana on October 21 and that Santana gave it to Perez on October 30 in the park near the store. Santana testified that he gave her the card in the street at the beginning of October and that Virgilio Peña was with him at the time. He recalled that he retrieved it with her signature about a week later, at her apartment, and that he put it in a bureau drawer at home, without initialing it, until he had an opportunity to give it to Perez. Santana testified that, after another week went by, he took Cortes’ card out of the drawer, initialed it and called Perez to tell him he had the card. He testified that October 21 is the date he did this. Santana testified further that he put the card back in the drawer until he met with Perez in the park and gave him the card on October 30. Perez testified that Santana called him and told him he had Cortes’ card but that he did not meet with Santana until October 30 to retrieve the card. Perez’ logs show that he met with employees of the Respondent on October 8, 22, and 26. Perez testified that Santana was not at those meetings.

Based on the above evidence and testimony from Ordoñez that Santana told him that Cortes signed her card after she was fired, the Respondent argued at the hearing that I should find that the card was not signed on October 8, as it appears on its face, but was signed after Cortes’ October 22 termination. I found the testimony of the General Counsel’s witnesses regarding Cortes’ card suspect. As noted above, Cortes and Santana did not corroborate one another regarding when the card was signed, where it was signed, or when and where it was given to Santana. Santana’s testimony regarding what he did with the card after he got it from Cortes makes no sense. Why would he put it in his drawer without initialing it, only to take it out of the drawer a week later to initial it and then put it back in the

²⁴ The General Counsel had the original card signed by Cortes at the hearing. General Counsel had only copies of the cards signed by the other alleged discriminatees because the originals had apparently been lost during renovations at the union office.

drawer for another 10 days until he gave it to Perez! Santana's asserted treatment of Cortes' card is in marked contrast to the Union's stated procedures for documenting receipt of cards and the treatment it accorded the cards signed by every other employee in this case. I also note that Cortes could not even recall accurately when she signed the card. Accordingly, I find that Cortes did not sign a union authorization card until after she was terminated by the Respondent.²⁵

Cortes testified further that, in August, while the Union was leafleting outside the store, she greeted Alvarez and Ruddy Rodriguez. Cortes saw that Luna was watching her as she spoke to them. According to Cortes, the Respondent's general manager, Matista, later told her not to speak to them, they were no good for the store. I credit Cortes regarding this incident because neither Luna nor Matista disputed her testimony. Cortes testified that she received no warnings or indication that her job was in jeopardy until October 22. After she returned home from work that day, Luna called her and told her to take the next day off. When she asked why, Luna told her there was a new policy, that he did not want anyone from the neighborhood working in the store. He told her that she was not the only one affected. When Cortes asked Luna how could this be legal, he told her that he would transfer her to another store. She asked him when she would start at the other store and Luna said he had to go to the other store and check for openings. Luna also told Cortes that, if she wanted, he would give her a letter so she could collect unemployment benefits. Cortes testified that she went to the store on Saturday and saw that other employees from the neighborhood were still working. She asked Luna if he had checked for openings at the other store and Luna told her that he had not had a chance to. Cortes called Luna the following week and he told her he still had not had a chance to check the other store. When Cortes asked Luna if she could work at Jerome Avenue until there was an opening at the other store, Luna said, "[N]o, no, you can't work here." Finally, when it appeared that Luna was not going to transfer her to another store, Cortes asked Luna for a letter to collect unemployment, which he gave her. On cross examination, Cortes adamantly denied that she had given merchandise away to her friends and denied that Luna ever accused her of this or cited this as the reason for not wanting anyone from the neighborhood working in the store. The General Counsel put into evidence a letter from the Respondent's counsel, submitted to the Region in response to the charge, stating that Cortes was terminated for two reasons: because business was slow and the Respondent let two cashiers go, and because Cortes was "doing improper things while being a cashier."²⁶

²⁵ My decision not to credit Cortes' testimony regarding the signing of her card does not detract from her credibility regarding the unlawful threats and interrogation she was subjected to by Luna. The conduct of Luna which she described is consistent with Luna's activity toward other employees, such as Duran and Ordoñez, who were particularly credible. It is also axiomatic that a trier of fact may believe some, but not all, of a witness' testimony. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

²⁶ The Board has historically considered such correspondence as relevant to the issue of motivation and has relied on these prehearing

Matista testified that he caught Cortes passing merchandise to people she knew on one occasion. He testified further that he brought it to her attention and told her that he would let it go this time but, if it happened again, she would be terminated. Matista admittedly did not tell Luna about this. Luna testified on direct that he fired Cortes for passing merchandise after he caught her doing it. Luna testified, contrary to Matista, that he learned from Matista, after she was fired, that she had been doing it for 4-5 months without his knowledge. On cross-examination, Luna claimed that he saw her passing merchandise three times before he spoke to her and told her he had to let her go. He claimed that he just walked away the first two times, even though he knew it was costing him money for her to give away merchandise. Luna's answers on cross-examination regarding what merchandise he saw her passing appeared to be made up as he went along. Although Luna initially testified that he also learned from the other cashiers that Cortes was passing merchandise, he admitted that he did not learn this until after he had terminated her. Luna's testimony also shifted regarding when he terminated Cortes. At first, he said he took her aside at work, told her that she could finish the day but was terminated. Later he claimed that he called her at home the night after he caught her doing it and terminated her. Finally, Luna testified that this was the only reason he terminated Cortes, despite his attorney's representation during the investigation that there were two reasons.²⁷

Because I found above that Cortes did not sign a union authorization card before her termination, there is no evidence that she engaged in protected activity other than listening to what Santana and Ruddy Rodriguez had to say about the Union and greeting Ruddy Rodriguez and Alvarez when they were leafleting outside the store in August. As noted above, Luna saw her doing the latter and Matista warned her not to speak to the terminated employees. Cortes' lack of union activity before her termination is understandable in light of the constant badgering she received at the hands of Luna regarding the Union. This finding would ordinarily dispose of the allegation regarding Cortes' termination. However, I am convinced that the Respondent's asserted reason for terminating Cortes is such a total fabrication that I am left to wonder why did Respondent terminate an employee who, by Luna's own admission, was considered a valuable employee? Luna's testimony about Cortes' alleged passing of merchandise was totally unbelievable and contradicted by Matista, who swore that he never told Luna about the one incident he claimed to have witnessed. I note further that the Respondent was not content to advance one false reason, but added another reason during the investigation that Luna testified on the witness stand had nothing to do with Cortes' termination! Although I did not believe everything that Cortes said, "I did find her denial that she passed merchandise convincing." In considering the evidence regarding Cortes' termination, I am mindful of the language in the Court's deci-

position statements as admissions of the Respondent in certain cases. *Steve Aloï Ford*, 179 NLRB 229 fn. 2 (1969).

²⁷ I accept Luna's testimony that the reference in the attorney's letter to "improper things" was intended to refer to the alleged passing of merchandise.

sion in *Shattuck Denn Mining Corp. v. NLRB*, “when the stated motive for [an employer’s action] is false, [the Board] can certainly infer that there is another motive. More than that, it can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least, where, as in this case, the surrounding facts tend to reinforce that inference.” 362 F.2d 466, 470 (9th Cir. 1966). See also *Montgomery Ward & Co.*, supra, and cases cited therein.

The Respondent’s antiunion animus and its desire to rid itself of union supporters is amply demonstrated by the numerous violations of Section 8(a)(1) of the Act. I note further that, before Cortes’ termination, Luna apparently believed she was anti-union and spoke freely to her about his opposition to the Union and what he would do to union supporters. He even sought to learn from her who was involved in the Union. His abrupt termination of her and fabrication of a false reason for the termination convinces me that Luna believed that she had become a union supporter. When an employer terminates an employee in the belief that the employee is engaged in union activities, the termination is unlawful, even if the employer’s belief is mistaken. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 589–590 (1941); *Dayton Hudson Department Store Co.*, 324 NLRB 33 (1997); *Salisbury Hotel*, 283 NLRB 685 (1987). Accordingly, I find that the Respondent terminated Cortes in violation of Section 8(a)(1) and (3) of the Act.

Olga Caraballo has been employed by the Respondent as a meat wrapper for about 9 years. Until January, she worked in the Respondent’s Madison Avenue store. When the Respondent opened the store on Jerome Avenue, it transferred the entire meat department, including Caraballo, from the Madison Avenue store. Caraballo testified that she first learned about the Union in July or August while having lunch in the park with Marvin Figueroa, the meat department manager who she identified as her supervisor, Virgilio Peña, who also works in the meat department, and Juan, the porter who cleans inside the store and whose last name she did not know. According to Caraballo, Perez introduced himself and told her about the benefits of the Union. Sometime after this meeting, Peña gave her a card to sign. Caraballo testified that she signed the card at home and gave it to Santana in the store the next day. Her card is dated August 3. Caraballo testified that she attended several meetings with the union organizer, in the park and at the restaurant, from August through October and that she also discussed the Union with Santana and her fellow meat department employees, Figueroa and Peña, while working in the store. She admitted that Luna never spoke to her about the Union. However, she testified that his attitude toward her changed and he became cold after the employees got involved with the Union.

Caraballo worked at Jerome Avenue until October 31 when Luna called her at home and told her that she was being sent back to Madison Avenue to help improve meat sales that had declined since the transfer. Caraballo was skeptical and told Luna she thought this was just a story, that there was nothing she could do to increase meat sales. She told him she would go to Madison Avenue because she was willing to work anywhere. Caraballo further testified that when she arrived at the Madison Avenue store the following Monday, the secretary, the butcher and the meat manager were all surprised to see her. The woman

who had been the meat wrapper at Madison Avenue was transferred to Jerome Avenue at the same time as Caraballo’s transfer. According to Caraballo, there has been no change in her duties since the transfer. She also testified that she has not observed any change in the volume of meat sales since her transfer. It is undisputed that Caraballo is the only one of the meat department employees who were sent to Jerome Avenue in January to be transferred back to Madison Avenue. However, Precio Orgin, the butcher at Jerome Avenue who had also come from the Madison Avenue store, was transferred to the Respondent’s store at Broadway and 150th Street in about August.

Luna testified that he initially transferred Caraballo from Madison Avenue to Jerome Avenue “temporarily” to help him out when the store opened and that he transferred her back to Madison Avenue because meat sales at that store had declined. According to Luna, Caraballo knew the customers in that store because she had worked there for so many years and he hoped she could improve sales. As a meat wrapper, Caraballo has contact with the customers because she is the one who puts the meat in the case and answers questions from customers. He admitted that he never told Caraballo that her transfer to Jerome Avenue was only temporary and that he didn’t transfer any other employees back to Madison Avenue. Luna further testified, as noted above with respect to Cupertino Luna, that it is a common practice to transfer employees among the Respondent’s stores. Luna denied that Caraballo’s transfer had anything to do with the Union and he denied any knowledge of her union activities or support. The Respondent’s counsel also submitted a letter to the Region during the investigation of the charge in which it stated that Caraballo was temporarily transferred to Jerome Avenue to “use her unique talents to train other meat wrappers.” This letter makes no reference to a decline in meat sales at Madison Avenue as a reason for Caraballo’s return to that store. Moreover, Caraballo testified without dispute that she only trained one new meat wrapper during the time she was at Jerome Avenue, a woman named Gisette who was related to Luna. Caraballo testified that she trained Gisette during her last 2 months at the Jerome Avenue store.

Although Caraballo signed a card for the Union and attended union meetings outside the store, she was not unique among meat department employees in engaging in such activities. There is no direct evidence that the Respondent was aware of her union activity and the circumstances surrounding the transfer back to Madison Avenue are not particularly evocative of any anti-union motivation. The timing of Caraballo’s transfer bears no nexus to any particular union activity on her part or generally.²⁸ In contrast to the termination of Cortes, the Respondent has not advanced a reason for Caraballo’s transfer that is patently false. I note that Caraballo had worked at the Madison Avenue store for 8 years before she was transferred to Jerome Avenue and that her job as a meat wrapper brought her

²⁸ I do not find it significant that charges were pending at the time of the transfer or that the General Counsel had recently issued a complaint against the Respondent. The General Counsel has not advanced a persuasive rationale for linking these events to the transfer of a minor player in the Union’s campaign.

into regular contact with customers.²⁹ It would be logical for Luna to believe that Caraballo had a relationship with the customers at Madison Avenue that might be helpful to the business. I note further that Caraballo suffered no adverse consequences from the transfer back to the store where she had spent most of her tenure with the Respondent and that other employees were transferred by the Respondent among its various stores, including one other employee in the meat department, Precio Orgin. Accordingly I conclude that the General Counsel has failed to establish a prima facie case that Caraballo's transfer was discriminatorily motivated and I shall recommend that this allegation be dismissed.

Jorge Santana also worked for the Respondent at the Madison Avenue store, for about 5 years before Luna transferred him to the new store on Jerome Avenue in January. Santana was in charge of the produce department at both stores. He had one employee, Ordoñez, working under him at Jerome Avenue. As noted above, Luna told Santana in February that the Union was around and that, if they approached Santana, he should tell them that he was not interested. Santana testified that he got involved with the Union's campaign in June and that he participated with Ruddy Rodriguez, Juan Alvarez, and Juan Rodriguez in meetings with employees and union organizer Perez. He signed a union authorization card on July 30 and, as confirmed by other witnesses, solicited other employees to sign cards. The Respondent stipulated at the hearing that it was aware of Santana's activity in support of the Union. According to Luna, it was Santana who approached Luna and tried to discuss the Union. Luna claimed that he told Santana that he did not want to talk about it, that it was up to Santana whether to join the Union and that Luna did not care as long as Santana did his job. Luna's self-serving characterization of his conversations with Santana is not credible. Santana testified that Rivera, the Respondent's assistant floor manager, asked him on two occasions, in July and October, if he had signed a card for the Union. Santana also testified that Rivera told him that Luna did not want anyone to sign union cards and that, if they did, they would be fired. Rivera denied speaking to Santana about the Union. I credit Santana's testimony over Rivera's denial. Santana also testified that Luna questioned him in August about a broken sign, indicating that he suspected the Union was responsible. In October, Luna accused Santana of having union meetings with the meat department employees during work. He told Santana that, if he was having such meetings, he would be fired. Santana told Luna that he knew his rights and that, if Luna fired him for this reason, he knew where to go. According to Santana, Luna responded, "[G]o wherever the f—k you want. It's my store and I'll run it the way I like. If you don't like it here, you know where the door is."

Santana was fired on December 1. The General Counsel argues that Santana was fired because of his union activities. The

Respondent contends that he was fired for punching General Manager Matista. According to Santana, he was at work on December 1, at about noon, when Questo told him there was someone looking for him at the front of the store. Santana went to the front and saw that it was a delivery man for one of the Respondent's suppliers. Santana was not expecting a delivery until the end of the week. He told the delivery man that he didn't order the merchandise and would not take it, but changed his mind just as the delivery man walked out of the store. Santana went out of the store to find the delivery man and tell him that he could use some merchandise after all. According to Santana, Matista followed him outside and angrily ordered him back inside the store. Matista shouted various profanities at Santana and maligned his manhood, essentially accusing him of hanging around outside the store when he should have been working inside. It is not clear whether Matista knew why Santana was outside and Santana did not testify that he gave Matista any explanation. Santana responded to Matista's verbal tirade by telling Matista to take it easy and to show him respect because he is much older. According to Santana, he also told Matista that his work was always complete. Matista then said, "[Y]ou think I'm afraid of you, m.f.? F—ing faggot. Get your ass inside and get to work!" Santana testified that when Matista called him a m.f. and faggot, he said, "Manny, please respect me, I'm older than you." Santana admitted that he touched Matista on the shoulder with his finger for emphasis. Santana then walked inside the store. According to Santana, Matista followed him into the store, still yelling profanities, calling him names and waving his arms. He told Santana to leave because he did not want him there. Santana told Matista that Luna was the one who hired him and that Matista was not his boss. Matista responded that he did not care about Luna, that he was the boss and that Santana had to go, that he was fired. Matista yelled to Mildred in the office to give Santana his money, because he was fired. Santana went to the back to take off his work jacket and then left the store with Marvin Figueroa and Peña to have lunch. Santana testified further that Rivera was standing next to Matista during the incident outside and that Manuel, whom he identified as the porter, came out and told Santana to come inside because it was not worth fighting over. He also observed Figueroa and Peña standing nearby when he went back into the store. Peña testified that he was standing just inside the doors during the incident and that he heard Santana telling Matista that he should respect him because of his age. Peña testified that he also saw Santana touch Matista on the shoulder with his index finger. Peña recalled seeing Matista follow Santana into the store, cursing him and yelling to Mildred to get Santana's check. At one point, according to Peña, Matista saw him and Figueroa watching and said, "[T]his goes for all you m.f.s that don't want to work in my store, you can all leave." Peña corroborated Santana's testimony that they went to lunch at that point. Peña also corroborated Santana that Rivera was outside with Matista during this incident. Rivera, who testified for the Respondent, claimed that he was not outside during the incident and that, by the time he got outside, Santana and Matista had already separated.³⁰

²⁹ The General Counsel's argument to the contrary is not persuasive. Customers would have very little contact with the butcher who works in the back room cutting the meat. It is the meat wrapper who takes the meat and puts it in the case and who is readily available to answer questions if a customer does not see what they are looking for in the case.

³⁰ Figueroa did not testify.

Matista testified that the incident actually began the day before when Santana called him a “f—ing asshole” after Matista had given him an order. On December 1, about noon, Matista saw Santana wandering around the front of the store, talking to the cashiers, when there was work to do in the produce department. According to Matista, when he saw Santana go outside the store and stand there, he went out to tell Santana that there was work to do inside the store and that he should not be standing around outside waiting for deliveries. Matista testified that, when he said this to Santana, Santana “got in his face” and said, “I’m f—ing tired of you being in my ass. You need to grow up. You’re a f—ing little kid. I’m an older man. You shouldn’t be telling me what to do.” Matista replied that he was Santana’s manager and that Santana was supposed to follow his orders. He told Santana that, if he asked Santana to go inside, it was because there was work to do, and that Matista does not pay anyone to stand around outside. According to Matista, Santana replied that Matista “had to stop kissing Ruben [Luna]’s ass” and he called Matista an “ass kisser.” Matista admitted that he became angry during this exchange and raised his voice, responding in kind to Santana’s verbal attacks. Matista testified that Raphael, the security guard, came out of the store as Santana punched Matista in the chest. Santana described it as a closed fist punch. According to Matista, the force of the punch caused him to step back. Matista testified that Raphael separated him and Santana and told Santana to go inside. Matista admits following him inside and telling Santana that he was fired and telling Mildred to make out Santana’s check because “he doesn’t work here anymore.” Matista also recalled seeing Peña standing nearby and admitted to yelling inside the store: “[W]hoever doesn’t want to follow my orders could pick up their check, too. Whoever feels I’m a little kid, that they shouldn’t follow my orders, then they could leave, too.” Raphael Corniel, the security guard employed by the Respondent, testified as a witness for the Respondent. He did not corroborate Matista’s testimony that Santana punched him with a closed fist. On the contrary, the gesture demonstrated by Corniel was closer to that described by Santana and Peña. Corniel did testify that he had to separate Matista and Santana and that, after he brought Santana into the store, he had to restrain him from going after Matista again.

Santana testified that, when he returned from lunch, at about 1 p.m., he went back to work in the produce department. Santana testified further that, at about 3–4 p.m., Luna returned to the store and approached Santana in the produce section. Luna asked what had happened and Santana told him that he and Matista had a little argument and that Matista cursed him out. According to Santana, Luna told him not to worry about it, that he would talk to Matista. Santana testified that he went to the front of the store a few minutes later and observed Luna and Matista talking by the registers. Santana continued working until about 5 p.m. when Matista approached him with two police officers. According to Santana, the police asked him what happened and Santana told them that he and Matista had a little argument. When the police asked Santana if he hit Matista, Santana said, “[N]o.” According to Santana, they then asked Matista if Santana hit him and Matista said, “No, I’d be lying if I said that he hit me. He just touched me. I don’t want him in

the store, that’s all. I don’t want him in the store anymore.” Santana testified further that the policeman called Luna from the front of the store and asked Luna if he had another store to send Santana to. Luna said he had another store but he would not commit to sending Santana to another store. The policeman then asked Luna if Santana was fired and Luna said to Santana that he was sorry, but if Matista said he was fired, then he is fired and he had to go. Santana replied that, if Luna said he was fired, then he will go, but he would not accept that from Matista because Matista was not his boss. Santana was given his check by Mildred at that time and he left the store.

Matista testified that he called the police and that, after he told the police what happened, they went to speak to Santana. Matista testified that he heard Santana admit to the policeman that he hit Matista. Matista did not explain why he waited almost 5 hours to call the police. The General Counsel called one of the responding officers as a witness, Officer Erick Acevedo, who testified that Santana told the officers that he had a “verbal argument” with Matista, that Matista “got up in his face” and that he pushed Matista. Luna testified that he was not present during the incident, but upheld Matista’s decision to fire Santana because Matista is the manager.

There is no dispute that Santana was a key union organizer and that the Respondent was aware of his support for the Union. The Respondent’s antiunion animus is apparent from the multiple violations found above. However, Santana’s discharge occurred quite some time after the other unfair labor practices and did not coincide with any event related to the Union’s effort to organize the Respondent’s employees. On the contrary, Santana was discharged the same day he admittedly had a dispute with the store manager during which he admittedly poked him in the shoulder. I do not believe Matista’s testimony that Santana “punched him” because the Respondent’s own witness, Corniel, who would have no reason to lie about this, corroborated Santana and Peña, not Matista.³¹ The issue presented is thus whether the Respondent would have discharged Santana for such conduct in the absence of union activity. It is undisputed that the Respondent had fired only one employee, other than those involved in this proceeding, before Santana’s discharge. That employee was fired for absenteeism. In addition, as found above, the Respondent fired Alvarez and Mesa on the same day after they were involved in a verbal dispute that threatened to turn violent. In Santana’s case, the verbal dispute involved a challenge to Matista’s authority which escalated to the point that Santana felt the need to poke Matista for emphasis. Although I found Santana to be a credible witness and suspect that he was provoked by Matista’s profane and abusive tirade, he nevertheless crossed the boundary of permissible employee conduct. The Respondent’s decision to terminate Santana under these circumstances is consistent with the way it treated Alvarez and Mesa after their dispute. Accordingly, I find that the Respondent has met its burden of proving that it would have terminated Santana even in the absence of union

³¹ Although Officer Acevedo testified that Santana admitted pushing Matista, Acevedo was not present during the altercation. The evidence from eyewitnesses who were at the scene establish that Santana merely poked Matista in the shoulder.

activity and shall recommend dismissal of this allegation of the complaint.³²

As noted above, Duran was one of the witnesses who appeared at the hearing only after the General Counsel obtained a district court order enforcing the subpoena. Duran testified to several conversations with Luna regarding his subpoena. According to Duran, when he got the subpoena before Christmas, he showed it to Luna and asked if he had to go. Luna told him, "[N]o, that's only if you want to." Luna also told Duran that if the union people or the lawyers kept bothering Duran, that Luna would tell his attorney so they would leave Duran alone. Duran also testified that Luna asked him whether the other reluctant witness, Ordoñez, was still going to union meetings, and if Ordoñez was going to go to court. Duran testified that, on January 10, Luna told him he had to go to court and that he would pay Duran \$100 for the day if he went to court. Duran normally makes \$5.15/hour. According to Duran, Luna started to get the money out of the safe, then stopped and said, "[W]ait, no, don't go." Duran did not appear at the hearing on January 11 or 12 and, as noted above, Luna represented in court on January 12 that Duran had quit. According to Duran, he was working that day and Luna told him that night that he had said in court that Duran quit. He told Duran not to come to work the rest of the week, that he would pay him for those days, and to return on the following Sunday. Duran recalled that Luna then reviewed each of the alleged discriminatees and told Duran the Respondent's version of why each was fired or transferred. Duran had no personal knowledge of any of these things. According to Duran, Luna told Duran to say these things at the hearing. Luna also told Duran to go to court on January 28, which was the original date scheduled for the resumption, and that he would give Duran a gift if he went. Luna did not deny meeting with Duran and talking to him about the subpoena. According to Luna, Duran's mother complained to him that Duran was under a lot of pressure from the lawyers to go to court and his family did not want him to get involved because he was only a kid. Luna claims that it was Duran's mother who asked him to fire Duran so that he wouldn't have to go to court. Luna testified that he told Duran that he had to go to court. Luna testified further that, when Duran told Luna that he was not going to go, Luna told him not to come to work because he did not want to be accused of hiding Duran. Luna acknowledged offering to give Duran \$100 if he would go to court, but he claims he told Duran that he would have to tell the truth.

The day after Duran finished testifying and was excused as a witness, the General Counsel moved to further amend the consolidated amended complaint to allege that the Respondent violated Section 8(a)(1) of the Act by directing employees not to appear before the Board to give testimony in this matter and by directing employees to testify as instructed by the Respondent. The General Counsel also sought to allege that the Respondent violated Section 8(a)(4) of the Act when it "temporar-

ily laid off" Duran from January 14 through 16, 1999. These allegations were based upon the testimony of Duran. I denied the General Counsel's motion to amend on due process grounds because, by waiting to amend the complaint until after a reluctant witness had been excused, the General Counsel had effectively deprived the Respondent of an opportunity to cross-examine the witness regarding these allegations. Although I am troubled by the egregious nature of the alleged unlawful conduct and the total disregard for the Board's proceedings demonstrated by Luna, I shall adhere to my ruling and make no unfair labor practice findings based on Duran's testimony as to his meetings with Luna after he received his subpoena. I have considered this testimony, which I found credible, in making my credibility resolutions. As noted above, Luna himself lied in open court when he asserted that Duran had quit and was no longer employed at the store. Such a cavalier attitude toward the truth was in marked contrast to the testimony of most of the General Counsel's witnesses who appeared to testify truthfully to the best of their ability regarding events that occurred many months before the hearing. It is expected that the remedy for those unfair labor practices found above will act as a deterrence to the Respondent from committing further violations of the Act and a reminder to the employees that their rights can be vindicated through Board proceedings.

CONCLUSIONS OF LAW

1. By interrogating employees concerning their union activities and the union activities of other employees; by interrogating employees concerning their cooperation with the Board's investigation; by threatening employees with a reduction in their work hours and discharge if they support the Union; by directing employees not to join or support the Union; and by directing employees to report on the union activities of other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Ruddy Rodriguez, Juan Rodriguez, and Alba Cortes because they joined or supported the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. The Respondent has not violated the Act in any other manner alleged in the consolidated amended complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

³² The fact that the termination was not effectuated until 5 hours after the incident is explained by Santana's refusal to accept Matista's authority to fire him. By alleging that Matista is a supervisor within the meaning of the Act, the General Counsel essentially concedes that Matista had such authority.